

# Malpractice Statute of Limitations in New York and Other Jurisdictions

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## THE MALPRACTICE STATUTE OF LIMITATIONS IN NEW YORK AND OTHER JURISDICTIONS\*

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The period of time within which to institute a malpractice action is governed in New York by section 50(1) of the Civil Practice Act which provides, *inter alia*, that an action to recover damages for malpractice "must be commenced within two years after the cause of action has accrued. . . ."<sup>1</sup> Since the statute does not define "malpractice," the courts in construing the term initially looked to nineteenth-century judicial usage,<sup>2</sup> which restricted the term to the professional negligence of physicians and surgeons.<sup>3</sup>

As viewed by the Court of Appeals, section 50(1), "in so far as it prescribes a limitation in actions to recover damages for malpractice, refers to actions to recover damages for personal injuries resulting from the misconduct of physicians, surgeons and others practicing a profession similar to those enumerated."<sup>4</sup> Under this "open end" approach,

\* The basic research for this article was completed by the author while serving as Research Consultant to the New York State Law Revision Commission. Research assistance, especially for the section "Jurisprudence of other States," was furnished by Donald L. Horowitz, Esq., of the New York Bar.

† See contributors' section, masthead p. 441, for biographical data.

<sup>1</sup> Malpractice was made a separate cause of action by N.Y. Sess. Laws 1900, ch. 117, § 1, which amended the Code of Civil Procedure § 384(1), the forerunner of Section 50(1). Before this amendment such an action fell under the Code of Civil Procedure § 383(5), N.Y. Sess. Laws 1877, ch. 416, § 1, which stipulated a three year period for an action "to recover damages for a personal injury resulting from negligence." *Burrell v. Preston*, 54 Hun 70, 7 N.Y. Supp. 177 (Sup. Ct. Livingston County 1889). The Court of Appeals prior to 1900 repeatedly used the term "malpractice" when referring to the professional negligence of physicians and surgeons. *Pike v. Honsinger*, 155 N.Y. 201, 49 N.E. 760 (1898); *Link v. Sheldon*, 136 N.Y. 1, 32 N.E. 696 (1892); *DuBois v. Decker*, 130 N.Y. 325, 29 N.E. 313 (1891); *Carpenter v. Blake*, 75 N.Y. 12 (1878).

<sup>2</sup> "Just what professions were intended to be benefited is left to conjecture save insofar as judicial discussion and consideration had sanctioned a general use of the word." *Hurlburt v. Gillett*, 96 Misc. 585, 588, 161 N.Y. Supp. 994, 995 (Sup. Ct. Kings County 1916), *aff'd* on opinion below, 176 App. Div. 893, 162 N.Y. Supp. 1124 (2d Dep't 1916).

<sup>3</sup> See cases cited at note 1 *supra*. See also *Bellinger v. Craigie*, 31 Barb. 534 (N.Y. 1860) and *Lynch v. Davis*, 12 How. Prac. 323 (N.Y. 1855). Compare note 11 *infra*.

<sup>4</sup> *Federal Int'l Banking Co. v. Touche*, 248 N.Y. 517, 518, 162 N.E. 507, 508 (1928).

dentists,<sup>5</sup> psychiatrists,<sup>6</sup> chiropractors,<sup>7</sup> pharmacists<sup>8</sup> and X-ray technicians<sup>9</sup> are within the section, while nurses and hospital employees,<sup>10</sup> as well as attorneys<sup>11</sup> and accountants,<sup>12</sup> fall without.

The malpractice statute of limitations being a comparatively short statute,<sup>13</sup> the extent of its coverage is of considerable interest to those contemplating or involved in a malpractice action.<sup>14</sup> Even more important is ascertaining when the permissible period for bringing such an action begins to run. This article is primarily concerned with the latter problem.

### THE NEW YORK RULE<sup>15</sup>

The two year period for bringing a malpractice action in New York commences running when "the cause of action has accrued."<sup>16</sup> In the absence of an express provision that the action accrues only upon the patient's discovery of the injury,<sup>17</sup> the New York courts have consistently held that the action accrues at the time of the acts of the physician which constitute the malpractice.<sup>18</sup>

<sup>5</sup> *Budoff v. Kessler*, 284 App. Div. 1049, 135 N.Y.S.2d 717 (2d Dep't 1954); *Doniger v. Berger*, 241 App. Div. 23, 271 N.Y. Supp. 30 (1st Dep't 1934); *Tulloch v. Haselo*, 218 App. Div. 313, 218 N.Y. Supp. 139 (3d Dep't 1926); *Hurlburt v. Gillett*, 96 Misc. 585, 161 N.Y. Supp. 994 (Sup. Ct. Kings County), *aff'd* on opinion below, 176 App. Div. 893, 162 N.Y. Supp. 1124 (2d Dep't 1916).

<sup>6</sup> *Hammer v. Rosen*, 7 N.Y.2d 376, 165 N.E.2d 756, 198 N.Y.S.2d 65 (1960).

<sup>7</sup> *Monahan v. Devinny*, 223 App. Div. 547, 229 N.Y. Supp. 60 (3d Dep't 1928).

<sup>8</sup> *Rudman v. Bancheri*, 260 App. Div. 957, 23 N.Y.S.2d 584 (2d Dep't 1940).

<sup>9</sup> *Leitch v. Mulcahy*, 177 Misc. 1077, 31 N.Y.S.2d 874 (Sup. Ct. N.Y. County 1941).

<sup>10</sup> *Ienstein v. Malcomson*, 227 App. Div. 66, 236 N.Y. Supp. 641 (1st Dep't 1929); *Wolff v. Jamaica Hosp.*, 11 App. Div. 2d 801, 205 N.Y.S.2d 152 (2d Dep't 1960).

<sup>11</sup> *O'Neill v. Gray*, 30 F.2d 776 (2d Cir. 1929), *cert. denied*, 279 U.S. 865 (1929); *Camp v. Reeves*, 209 App. Div. 488, 205 N.Y. Supp. 259 (1st Dep't 1924), *aff'd* *mem.*, 240 N.Y. 672, 148 N.E. 753 (1925). The term "malpractice" has been used with respect to attorneys in disbarment proceedings. *Matter of Baum*, 55 Hun 611, 8 N.Y. Supp. 771 (2d Dep't 1890); *Matter of Yates*, 4 Johns. 317, 367 (N.Y. 1809). Courts have also used the term loosely in civil actions against attorneys based upon professional negligence. *Goldberg v. Bosworth*, 29 Misc. 2d 1057, 215 N.Y.S.2d 849 (Sup. Ct. Kings County 1961). There is little doubt, however, that § 50(1) is inapplicable in such situations. *Peters v. Powell*, 22 Misc. 2d 509, 196 N.Y.S.2d 304 (Sup. Ct. Erie County 1960). See generally Note, 3 Brooklyn L. Rev. 284 (1934). But see Comm. on Medical Jurisprudence, Report on Amendment to Statute of Limitations Relating to Malpractice Suits, 13 Record of N.Y.C.B.A. 465, 468 (1958) (minority report).

<sup>12</sup> *Federal Int'l Banking Co. v. Touche*, 248 N.Y. 517, 162 N.E. 507 (1928).

<sup>13</sup> The negligence statute of limitations in New York is three years (N.Y. Civ. Prac. Act § 49(6)), while the contract and fraud statutes are six years (N.Y. Civ. Prac. Act §§ 48(1), (5)).

<sup>14</sup> Note, 21 St. John's L. Rev. 77 (1946).

<sup>15</sup> See generally Reich, "The Statute of Limitations Applicable to Malpractice Actions in New York," 11 N.Y.U. Intra. L. Rev. 190 (1956); The Statute of Limitations in Malpractice Actions, Leg. Doc. No. 65(E) at 39-46, Report N.Y. Law Rev. Comm'n at 167-74 (1942).

<sup>16</sup> See text accompanying note 1 supra.

<sup>17</sup> Cf. N.Y. Civ. Prac. Act § 48(5), which expressly states that a cause of action for fraud is not deemed to have accrued until the discovery of the facts constituting the fraud.

<sup>18</sup> See, e.g., *Golia v. Health Ins. Plan of Greater N.Y.*, 6 App. Div. 2d 884, 177 N.Y.S.2d 550 (2d Dep't 1958), *aff'd* *mem.*, 7 N.Y.2d 931, 165 N.E.2d 578, 197 N.Y.S.2d 735 (1960); *Budoff v. Kessler*, 284 App. Div. 1049, 135 N.Y.S.2d 717 (2d Dep't 1954); *Ranalli v.*

*Conklin v. Draper*<sup>19</sup> is the leading case. A physician, while operating upon the plaintiff for appendicitis on May 27, 1925, closed the incision leaving a pair of arterial forceps behind. After two years, during which time she experienced symptoms of ill-health, an X-ray photograph taken by another doctor disclosed the presence of the forceps. The next day, July 13, 1927, a second operation was performed and the forceps removed. Plaintiff commenced her action on July 5, 1929, within two years of the discovery of the forceps, but not within two years after the operation by the physician. The Appellate Division granted the physician's motion to dismiss the cause of action.

The action was not commenced until four years after the operation took place and after the defendant attended and rendered services to the plaintiff. The time within which to bring such an action being limited to two years, the Statute of Limitations is a bar. . . .

The plaintiff argues that the statute should begin to run from the time of the discovery of the malpractice. The decisions setting forth the purpose and effect of such statute are to the contrary. . . .<sup>20</sup>

The court rejected plaintiff's argument that the physician's knowledge that the forceps remained in her and his concealment thereof constituted an act of continuing malpractice, tolling the statute of limitations until either the physician performed his duty or the plaintiff learned or should have learned of her condition.<sup>21</sup>

Under this strict approach, as one notewriter observed twenty years ago:

[A] plaintiff can bring an action for malpractice only if he has been fortunate enough to discover the wrong within two years after its commission. Even though a failure to become aware of the injury to his person within this period of time is not due to any lack of diligence on his part, the action is nevertheless barred and plaintiff left without a satisfactory means of redress.<sup>22</sup>

Three recent cases illustrate the point.

In *Budoff v. Kessler*<sup>23</sup> a drill was left imbedded in one of the plaintiff's teeth during the course of dental work ending May 6, 1952. X-rays

Breed, 251 App. Div. 750, 297 N.Y. Supp. 688 (2d Dep't 1937), aff'd mem., 277 N.Y. 630, 14 N.E.2d 195 (1938); *Rokita v. Germaine*, 12 Misc. 2d 84, 176 N.Y.S.2d 34 (Sup. Ct. Queens County 1958), aff'd, 8 App. Div. 2d 620, 185 N.Y.S.2d 272 (2d Dep't 1959); *Nervick v. Fine*, 195 Misc. 464, 87 N.Y.S.2d 534 (Sup. Ct. Kings County), aff'd, 275 App. Div. 1043, 91 N.Y.S.2d 924 (2d Dep't), leave to appeal denied, 276 App. Div. 775, 93 N.Y.S.2d 298 (2d Dep't 1949). See generally Note, 16 St. John's L. Rev. 101 (1941).

<sup>19</sup> 229 App. Div. 227, 241 N.Y. Supp. 529 (1st Dep't), aff'd mem., 254 N.Y. 620, 173 N.E. 892 (1930); Note, 15 Minn. L. Rev. 245 (1931).

<sup>20</sup> 229 App. Div. 227, 229-30, 241 N.Y. Supp. 529, 531-32 (1st Dep't 1930).

<sup>21</sup> Id. at 232, 241 N.Y. Supp. at 534.

<sup>22</sup> Note, 16 St. John's L. Rev. 101, 103 (1941).

<sup>23</sup> 284 App. Div. 1049, 135 N.Y.S.2d 717 (2d Dep't 1954).

taken April 15, 1954 revealed the drill and a complaint was served August 17, 1954. The Appellate Division, relying on *Conklin*, granted a motion to dismiss.

The Statute of Limitations commenced to run no later than the termination of the dentist-patient relationship between the parties on May 6, 1952, despite the fact that plaintiff did not know about the presence of the foreign object which defendants allegedly permitted to remain in plaintiff's mouth.<sup>24</sup>

*Rokita v. Germaine*<sup>25</sup> involved a sponge left in the plaintiff on June 20, 1953, during the performance of a Caesarean section. A second operation was performed to remove the sponge on July 6, 1953, but not until October 5, 1956 did the plaintiff learn of the sponge. Her malpractice action commenced April 10, 1957 was dismissed, the court citing *Conklin* and holding that "the statute began to run from the date of the original operation and not from the date of the discovery of the malpractice."<sup>26</sup>

Finally, *Dorfman v. Schoenfeld*<sup>27</sup> concerned another errant sponge, this time left in the plaintiff during the course of a 1952 4th-of-July appendectomy. Plaintiff experienced some pain in April, 1957 but the alleged malpractice was not discovered until January, 1958. An action brought in July, 1958 was dismissed on the authority of *Conklin*.

I hold that the injury here actually occurred—insofar as this defendant's causative acts are concerned—when the operation was complete. The damage was done then, and not when pain was first felt. Pain is the result of the injury, not the injury itself.

The plaintiffs make a stirring appeal for a change of the New York law in malpractice cases. It is undoubtedly within the competence of the courts to make the change. . . . But, in the light of the very recent appellate determinations . . . , whether Special Term may properly take the initiative is another matter. . . .<sup>28</sup>

<sup>24</sup> Id. at 1049, 135 N.Y.S.2d at 719.

<sup>25</sup> 12 Misc. 2d 84, 176 N.Y.S.2d 34 (Sup. Ct. Queens County 1958), aff'd, 8 App. Div. 2d 620, 185 N.Y.S.2d 272 (2d Dep't 1959).

<sup>26</sup> 12 Misc. 2d 84, 87, 176 N.Y.S.2d 34, 37 (Sup. Ct. Queens County 1958).

<sup>27</sup> 26 Misc. 2d 37, 203 N.Y.S.2d 955 (Sup. Ct. N.Y. County), appeal dismissed 11 App. Div. 2d 1024, 214 N.Y.S.2d 289 (1st Dep't 1960).

<sup>28</sup> Id. at 38, 39, 203 N.Y.S.2d at 957. The Court of Appeals, while affirming Appellate Division decisions holding that the malpractice statute begins to run from the date of the negligent act or omission and not the discovery thereof, has always done so without opinion. *Golia v. Health Ins. Plan of Greater N.Y.*, 6 App. Div. 2d 884, 177 N.Y.S.2d 550 (2d Dep't 1958), aff'd mem., 7 N.Y.2d 931, 165 N.E.2d 578, 197 N.Y.S.2d 735 (1960); *Ranalli v. Breed*, 251 App. Div. 750, 297 N.Y. Supp. 688 (2d Dep't 1937), aff'd mem., 277 N.Y. 630, 14 N.E.2d 195 (1938); *Conklin v. Draper*, 229 App. Div. 227, 241 N.Y. Supp. 529 (1st Dep't), aff'd mem., 254 N.Y. 620, 173 N.E. 892 (1930). Compare *Robins v. Finestone*, 308 N.Y. 543, 127 N.E.2d 330 (1955) and *Hammer v. Rosen*, 7 N.Y.2d 376, 165 N.E.2d 756, 198 N.Y.S.2d 65 (1960). Thus it has never categorically placed its seal of approval on the above reasoning, although its answer in *Conklin* to a certified question amounts to at least tacit acquiescence. 254 N.Y. at 621, 173 N.E. at 893. As the trial judge in *Dorfman v. Schoenfeld* suggests, possibly the Appellate Division and certainly the Court of Appeals may change the present construction of § 50(1).

Judicial revision of New York's traditional view, however, would seem to be wishful thinking, and law review writers have urged legislative action for over twenty years.<sup>29</sup> Uniformly, they have stressed the need for a statute running from the discovery of the malpractice.<sup>30</sup> The Law Revision Commission recommended such a statute in 1942,<sup>31</sup> as did the Committee on Medical Jurisprudence of the Association of the Bar of the City of New York in 1958.<sup>32</sup> The latter concluded:

[I]t is a denial of justice to deprive a patient injured through the negligence of his doctor of any remedy where through excusable ignorance he is unaware of the doctor's negligence until after the lapse of two years. . . .<sup>33</sup>

Nevertheless, such is the state of the law in New York today. Attempts to circumvent the statute of limitations, which have met with limited success, will be discussed below.

#### ATTEMPTS TO CIRCUMVENT THE NEW YORK RULE

Most reported malpractice cases in New York involve the statute of limitations, and since the injury inflicted by the physician or surgeon is often hidden and not readily discoverable, a large proportion are held barred by New York's two year statute.<sup>34</sup> As might be expected,

<sup>29</sup> "An amended statute, explicit in terms and leaving no room for doubt on any point, would prevent further injustice. This section, perhaps more than any other, merits the attention of the revisers of our Civil Practice Act." Note, 16 St. John's L. Rev. 101, 108 (1941).

<sup>30</sup> Among the many writers taking such a position, see the following in New York: Reich, *supra* note 15, at 198; Notes, 31 St. John's L. Rev. 123, 125 (1956); 1 Syracuse L. Rev. 471, 479 (1950); 21 St. John's L. Rev. 77, 80 (1946); 16 St. John's L. Rev. 101, 107 (1941); 12 St. John's L. Rev. 330, 335-36 (1938). One writer in an insurance journal has argued against statutory amendment. "Doctors now find the cost of their malpractice insurance to be a serious financial burden. To suggest liberalization by drastic modifications of the present statute of limitations and rules of liability in these cases would effect no good purpose and would assist towards pricing this kind of insurance right out of the market." Martin, "Comments on the Problem of Malpractice in New York State," 22 Ins. Counsel J. 460, 464 (1955). Insofar as the writer's first sentence is concerned, it appears to conflict with an American Medical Association survey indicating that 56.4% of physicians consider their premiums for malpractice insurance "reasonable." Comment, 164 J.A.M.A. 1583, 1584 (1957). His second sentence presents a valid but not controlling policy consideration. Compare Note, 12 St. John's L. Rev. 330, 336 (1938): "Undoubtedly the physician, surgeon or dentist would not be as fully protected [under a statute running from the discovery of the malpractice] as he is under the section as it stands today, but in the current trend of opinion much of this protection is unwarranted and unjust." See also Committee on Medical Jurisprudence, *supra* note 11, at 467.

<sup>31</sup> Recommendations of the Law Revision Commission to the Legislature, Leg. Doc. No. 65(E) at 13-15, Report N.Y. Law Rev. Comm'n at 141-43 (1942).

<sup>32</sup> See Committee on Medical Jurisprudence, *supra* note 11, at 467-68.

<sup>33</sup> *Id.* at 466.

<sup>34</sup> "The number of adjudicated cases in which the question has arisen is no criterion as to the number of instances in which such right of action has been lost by the lapse of time, for it is quite obvious that in view of the adjudications attorneys would advise their clients that action would be fruitless." *Id.* at 465.

plaintiffs frequently have sought ways of averting the rule's severity.<sup>35</sup> They have urged upon the courts, with varying degrees of success, the adoption of a number of theories to circumvent the strict operation of the statute. The three main lines of argument are (1) the continuous treatment doctrine, (2) the action for breach of contract, and (3) the action for fraud.

### *Continuous Treatment*

The view that the statute of limitations runs from the date of the malpractice and not the discovery thereof leaves open the question: When did the malpractice occur? In many cases, such as a surgeon's failure to remove the proverbial sponge, the facts can yield but one answer. In other cases, however, the negligent physician continues to treat the injured patient long after his initial negligent act. The commencement of the statutory period in such cases has sometimes been postponed until the end of such treatment.

*Sly v. Van Lengen*,<sup>36</sup> the earliest case concerned with continuous treatment, saw the defendant physician close an opening during an abdominal operation on November 30, 1918, without removing a gauze sponge. The physician continued to treat the plaintiff up to September 28, 1921, during which time the foreign substance remained in her pelvic cavity. Plaintiff instituted suit on February 1, 1923, more than four years after the operation, claiming that the time within which she could institute an action commenced to run from the termination of the physician's services in September, 1921. The court agreed with plaintiff's contention,<sup>37</sup> but it left the basis for its holding somewhat unclear.

If it should appear upon the trial that the injury from which plaintiff is suffering was inflicted at the time of the operation and was not occasioned in any manner by the subsequent treatment of the plaintiff, nor by any neglect on his part after the operation, a different situation would arise. . . . It will be noted that the complaint alleges that the injuries complained of were occasioned not only because defendant closed the incision without removing the sponge from plaintiff's pelvic cavity, but

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<sup>35</sup> Indeed, the first reported case construing the present malpractice statute involved an attempt to sidestep it. *Hurlburt v. Gillett*, 96 Misc. 585, 161 N.Y. Supp. 994 (Sup. Ct. Kings County 1916), *aff'd* on opinion below, 176 App. Div. 893, 162 N.Y. Supp. 1124 (2d Dep't 1916).

<sup>36</sup> 120 Misc. 420, 198 N.Y. Supp. 608 (Sup. Ct. Onondaga County 1923), Note 37 Harv. L. Rev. 272 (1923).

<sup>37</sup> The court expressly followed an Ohio sponge case, *Gillette v. Tucker*, 67 Ohio St. 106, 65 N.E. 865 (1902), where "it was held that the limitation did not begin to run against plaintiff's right to maintain the action until the case had been abandoned by the defendant, or the professional relationship terminated." *Sly v. Van Lengen*, *supra* note 36, at 422, 198 N.Y. Supp. at 610. While it is conceivable that in a given case the termination of the treatment and the termination of the professional relationship might not coincide, no New York case with such a disparity seems to have arisen, at least in a statute of limitations context. See Note, 20 Minn. L. Rev. 96, 97 (1935).

also because defendant negligently allowed the foreign substance to remain in plaintiff's body from day to day for upwards of two and a half years while he continued to treat her.<sup>38</sup>

While the court indicates that the statute would have run from the date of the operation had not there been an allegation of negligent treatment thereafter, it leaves in doubt the nature of the conduct required to constitute negligent treatment. Phrases such as "neglect on his part after the operation" and "allowed the foreign substance to remain" demonstrate, in one writer's opinion, the court's belief "that there is a continuous obligation upon the physician to remedy the negligent act, and his daily breach of this duty is in itself malpractice."<sup>39</sup> This view is supported by the court's observations that there was a "continuous breach of duty on the part of the defendant . . . in failing to remove the sponge. . . ."<sup>40</sup>

The continuous treatment theory enunciated in the *Sly* case was not available to the plaintiff in *Conklin*, since there the negligent physician performed no postoperative services,<sup>41</sup> but the Appellate Division twice suggests that the statute of limitations begins to run at the termination of the treatment.<sup>42</sup> It may commence running, according to *Nervick v. Fine*,<sup>43</sup> a 1949 decision following *Sly*,

at the end of one operation, or at the end of a series of operations, or at the end of the postoperative care. The malpractice might be malfeasance, misfeasance or nonfeasance in the operation or in the aftercare.<sup>44</sup> (Emphasis added.)

The Court of Appeals recently utilized the continuous treatment

<sup>38</sup> *Sly v. Van Lengen*, supra note 36, at 422, 198 N.Y. Supp. at 610.

<sup>39</sup> Note, 15 Minn. L. Rev. 245, 246 (1931). But see Anderson, "The Application of Statutes of Limitation to Actions Against Physicians and Surgeons," 25 Ins. Counsel J. 237, 242 (1958).

<sup>40</sup> *Sly v. Van Lengen*, supra note 36, at 422, 198 N.Y. Supp. at 610. See Louisell & Williams, Trial of Medical Malpractice Cases 371 (1960). A contemporary notewriter argued that "the physician should not be deemed to have been negligent after the operation unless the ordinary diligent physician would have discovered the presence of the sponge." Note, 37 Harv. L. Rev. 272, 273 (1923).

<sup>41</sup> "The end of treatment exception, while adding a degree of leniency to the majority rule, is unavailable in most cases because of the absence of the necessary factual situation. . . . The surgeon seldom has much to do with the post-operative treatment, and yet most of the cases deal with foreign materials left in the body of a patient during an operation. For this reason, the end of treatment exception does not eliminate the objections to the majority rule, but merely lessens them in special situations." Note, "The Statute of Limitations in Actions for Undiscovered Malpractice, 12 Wyo. L.J. 30, 32 (1957).

<sup>42</sup> 229 App. Div. 227, 229, 241 N.Y. Supp. 529, 531-32 (1st Dep't 1930). See also the memorandum opinion of the Court of Appeals, 254 N.Y. 620, 621, 173 N.E. 892, 893 (1930).

<sup>43</sup> 195 Misc. 464, 87 N.Y.S.2d 534 (Sup. Ct. Kings County), aff'd 275 App. Div. 1043, 91 N.Y.S.2d 924 (2d Dep't), leave to appeal denied, 276 App. Div. 775, 93 N.Y.S.2d 298 (2d Dep't 1949).

<sup>44</sup> 195 Misc. at 465, 87 N.Y.S.2d at 535. Cf. *Figuerca v. City of New York*, 106 N.Y.S.2d 430 (Sup. Ct. Kings County 1951), aff'd, 279 App. Div. 771, 109 N.Y.S.2d 126 (2d Dep't 1951).



theory in *Hammer v. Rosen*,<sup>45</sup> holding that a malpractice action based upon a psychiatrist's beatings of a patient was not barred because the beatings "were part and parcel of a continuing course of psychiatric treatment which did not terminate until . . . the very year in which the action was begun."<sup>46</sup> The court, citing the above two cases as authority, made no mention that the subsequent treatment need itself be negligent, and a recent lower court decision construes the case as holding "that the statute of limitations against malpractice starts to run when a course of treatment ends without regard to whether there have been negligent acts throughout the course of treatment."<sup>47</sup> Seemingly, the continuous treatment must still be related to the original negligent act.

Under this approach, postoperative supervision of a patient's convalescence would toll the statute when a surgeon was sued for negligent performance of an operation, but the fact that after the operation the surgeon treated the patient for an entirely different malady would have no such effect. Most lower court decisions apparently support this view.<sup>48</sup> Yet, some opinions do not spell out the requirement that the continuing treatment be related, implying that any subsequent treatment may be sufficient.<sup>49</sup>

Louisell and Williams, surveying the continuous treatment confusion in New York and other states, contribute a helpful analysis of the problem.

Where the injury results from a course of treatment and no specific act can be isolated to account for the result, the date of the wrongful act is considered to be that of the termination of the treatment. This modification of the time-of-wrongful act rule should be distinguished from the rule followed in some jurisdictions that the statute runs from the termination of treatment without regard to the particular act causing the injury.<sup>50</sup>

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<sup>45</sup> 7 N.Y.2d 376, 165 N.E.2d 756, 198 N.Y.S.2d 65 (1960).

<sup>46</sup> *Id.* at 380, 165 N.E.2d at 757, 198 N.Y.S.2d at 67.

<sup>47</sup> *Borgia v. City of New York*, — Misc. 2d —, —, 216 N.Y.S.2d 897, 903 (Sup. Ct. Kings County 1961).

<sup>48</sup> See *Ferraro v. New York Univ.*, 13 Misc. 2d 131, 177 N.Y.S.2d 788 (Sup. Ct. N.Y. County 1958); *Matthews v. Pisani*, 138 N.Y.S.2d 543 (Sup. Ct. Nassau County 1954); *Figuerca v. City of New York*, *supra* note 44. Cf. *Golia v. Health Ins. Plan of Greater N.Y.*, 6 App. Div. 2d 884, 177 N.Y.S.2d 550 (2d Dep't 1958), *aff'd mem.*, 7 N.Y.2d 931, 165 N.E.2d 578, 197 N.Y.S.2d 735 (1960). But see *Numme v. Crescenzi*, 144 N.Y.S.2d 145 (Sup. Ct. Westchester County 1955) (conclusory allegation of continued treatment in a negligent manner disregarded and complaint dismissed). Cf. *Steele v. City of New York*, 12 Misc. 2d 605, 607, 177 N.Y.S.2d 816, 817 (Sup. Ct. N.Y. County 1958) (notice to city not timely and "no claim that the post-operative treatment was rendered in a negligent manner").

<sup>49</sup> *Piedmont v. Society of New York Hosp.*, 25 Misc. 2d 41, 42, 204 N.Y.S.2d 592, 594 (Sup. Ct. Queens County 1960) (statute computed "from the date when the doctor last treated the patient"). Cf. *Budoff v. Kessler*, 284 App. Div. 1049, 135 N.Y.S.2d 717 (2d Dep't 1954).

<sup>50</sup> *Louisell & Williams*, *supra* note 40, at 369-70.

New York courts make no attempt to justify their position on the ground that it is impossible to isolate the specific wrongful act in the course of continuous treatment. Since nonnegligent and perhaps even unrelated subsequent treatment apparently tolls the statute, New York has gone far beyond a modification of the traditional view that the cause of action accrues when the wrongful act is committed. Manifestly, this approach is an attempt to circumvent the sometimes harsh application of New York's rigid statute. It has been successful in this objective where continuous treatment in fact took place.

### *Contract Action*

The physician-patient relationship being a contractual one, a physician's negligence may constitute a breach of contract.<sup>51</sup> Early attempts to frame a cause of action in contract, and thereby take advantage of a longer limitation period,<sup>52</sup> proved futile.<sup>53</sup> Courts quickly pierced pleadings framed in contract terms and applied the malpractice statute.<sup>54</sup> Allegations of pain and suffering and requests for unliquidated damages were treated as sure indicia that the action was one for malpractice.<sup>55</sup> In *Horowitz v. Bogart*,<sup>56</sup> where a physician agreed to remove an ulcer from the plaintiff's body but instead removed his appendix, the latter attempted to evade the malpractice statute by omitting allegations of "lack of skill" or "negligence" and including a reference to "improper performance of the work to the personal injury of the plaintiff." He was unsuccessful.

The nature of the charge of malpractice is not changed by failing to sufficiently state it in necessary detail, or by putting it in language suitable to the statement of a cause of action on contract, omitting the usual allegations as to absence of skill and negligence.<sup>57</sup>

Scarcely had the above been established, however, before the courts began delimiting an area where a contract action was permissible. Dismissing the complaint in *Monahan v. Devinny*<sup>58</sup> on the ground that it was barred by the malpractice statute of limitations, the court openly recommended that the plaintiff sue in contract to obtain partial relief.

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<sup>51</sup> See generally Miller, "The Contractual Liability of Physicians and Surgeons," 1953 Wash. U.L.Q. 413.

<sup>52</sup> The contract statute of limitations is six years, N.Y. Civ. Prac. Act § 48(1), in contrast to the two year malpractice period. N.Y. Civ. Prac. Act § 50(1).

<sup>53</sup> *Burrell v. Preston*, 54 Hun 70, 7 N.Y. Supp. 177 (Sup. Ct. Livingston County 1889).

<sup>54</sup> *Hurlburt v. Gillett*, 96 Misc. 585, 161 N.Y. Supp. 994 (Sup. Ct. Kings County), aff'd on opinion below, 176 App. Div. 893, 162 N.Y. Supp. 1124 (2d Dep't 1916).

<sup>55</sup> See text accompanying notes 80-84 *infra*.

<sup>56</sup> 218 App. Div. 158, 217 N.Y. Supp. 881 (1st Dep't 1926).

<sup>57</sup> *Id.* at 160, 217 N.Y. Supp. at 882.

<sup>58</sup> 223 App. Div. 547, 229 N.Y. Supp. 60 (3d Dep't 1928).

*Conklin v. Draper*,<sup>59</sup> the leading case barring a malpractice action, also involved a cause of action in contract which withstood the defendant's motion to dismiss. Other cases followed suit.<sup>60</sup> The damages recoverable in each instance differed sharply from those recoverable in malpractice actions, for reasons explained in *Colvin v. Smith*.<sup>61</sup>

The damages recoverable in malpractice are for personal injuries, including the pain and suffering which naturally flow from the tortious act. In the contract action, they are restricted to the payments made and to the expenditure for nurses and medicines or other damages that flow from the breach thereof.<sup>62</sup>

The contract action, which one notewriter has characterized as "an entirely unsatisfactory remedy affording plaintiff only partial relief,"<sup>63</sup> is not always available to the plaintiff. Where the common-law duty to use due care and the contractual duty are essentially the same, a physician's negligence is actionable only by a malpractice suit.<sup>64</sup> Thus in *Hertgen v. Weintraub*,<sup>65</sup> where a physician left a needle in a patient's body after delivering her of child, the court held that "at the most the wrong complained of is tortious and nothing else,"<sup>66</sup> since the physician had promised only to use due care in delivering the child and this sole promised result had been accomplished. The court quoted the following excerpt from *Carr v. Lipshie*,<sup>67</sup> which demonstrates why a contract remedy is unavailable in a large number of malpractice cases.

Actions for breach of contract have been sustained where a specific result is guaranteed by the terms of the agreement, but not where the contracting party either expressly or impliedly promises to perform services of the standard generally followed in the profession or promises to use due care in the performance of the services to be rendered. The pleading

<sup>59</sup> 229 App. Div. 227, 241 N.Y. Supp. 529 (1st Dep't), aff'd mem., 254 N.Y. 620, 173 N.E. 92 (1930); Note, 15 Minn. L. Rev. 245 (1931).

<sup>60</sup> *Hirsch v. Safian*, 257 App. Div. 212, 12 N.Y.S.2d 568 (1st Dep't 1939); *Keating v. Perkins*, 250 App. Div. 9, 293 N.Y. Supp. 197 (1st Dep't 1937); Note, 5 U. Chi. L. Rev. 156 (1937); *Frank v. Maliniak*, 232 App. Div. 278, 249 N.Y. Supp. 514 (1st Dep't 1931).

<sup>61</sup> 276 App. Div. 9, 92 N.Y.S.2d 794 (3d Dep't 1949).

<sup>62</sup> Id. at 9-10, 92 N.Y.S.2d at 795. See Miller, supra note 51, at 428.

<sup>63</sup> Note, 16 St. John's L. Rev. 101, 104 (1941).

<sup>64</sup> *Horowitz v. Bogart*, 218 App. Div. 158, 217 N.Y. Supp. 881 (1st Dep't 1926); *Hurlburt v. Gillett*, supra note 54; *Burrell v. Preston*, 54 Hun 70, 7 N.Y. Supp. 177 (Sup. Ct. Livingston County 1889). Cf. *Gautieri v. New Rochelle Hosp. Ass'n*, 4 App. Div. 2d 874, 166 N.Y.S.2d 934 (2d Dep't 1957), aff'd, 5 N.Y.2d 952, 157 N.E.2d 172, 183 N.Y.S.2d 803 (1959). Where plaintiff's malpractice action is held barred by the two year statute, leave to serve an amended complaint alleging a breach of contract will be granted. *Matter of Robillard's Will*, 136 N.Y.S.2d 79 (Sup. Ct. Kings County 1951). Compare *Budoff v. Kessler*, 284 App. Div. 1049, 135 N.Y.S.2d 717 (2d Dep't 1954), with *Budoff v. Kessler*, 2 App. Div. 2d 760, 153 N.Y.S.2d 654 (2d Dep't 1956). See also Miller, supra note 51, at 433-34.

<sup>65</sup> 29 Misc. 2d 396, 215 N.Y.S.2d 379 (Sup. Ct. Kings County 1961).

<sup>66</sup> Id. at 398, 215 N.Y.S.2d at 381. The court gave the same characterization to a second cause of action based upon breach of warranty. Id. at 398, 215 N.Y.S.2d at 382.

<sup>67</sup> 8 App. Div. 2d 330, 187 N.Y.S.2d 564 (1st Dep't 1959) (analogous case involving a firm of accountants).

herein does not allege a promise to accomplish a definite result. . . . It merely states that the defendants would perform the services with due care and in accordance with the recognized and accepted practices of the profession.<sup>68</sup>

A contract action is maintainable, however, when a physician expressly engages to do something in excess of his common-law duty. A frequent illustration of this involves a special agreement by the physician either to cure the patient or to achieve a particular result. Breach of such an agreement gives rise to contractual liability.<sup>69</sup> *Robins v. Finestone*,<sup>70</sup> where the plaintiff employed a surgeon to remove a growth, is an excellent example of the type of case where a contract action is allowed. There the surgeon allegedly promised the plaintiff that he would be cured in one or two days; instead he was hospitalized for a month. The Court of Appeals, upholding his contract action, stated:

[A] doctor and his patient are at liberty to contract for a particular result and, if that result be not attained, a cause of action for breach of contract results which is entirely separate from one for malpractice although both may arise from the same transaction.<sup>71</sup>

Closely allied to the special contract to cure is the agreement to use a particular method to achieve the desired result. If a method other than that agreed upon is employed and the patient is injured, he may sue for breach of contract. In *Frank v. Malimiak*<sup>72</sup> a plastic surgeon agreed to treat the plaintiff's condition by internal surgery without making external incisions. When such incisions were made, the surgeon was held liable for breach of contract. *Robins v. Finestone*,<sup>73</sup> where a contract action was sustained, involved a similar situation.

Finally, a contract recovery has been permitted in New York where the physician has agreed to perform an operation but fails to do so to the injury of the patient. While improper performance of an operation generally gives rise only to a malpractice action,<sup>74</sup> failure to perform the correct operation will permit an action for breach of contract.<sup>75</sup>

<sup>68</sup> Id. at 332, 187 N.Y.S.2d at 567.

<sup>69</sup> *Colvin v. Smith*, 276 App. Div. 9, 92 N.Y.S.2d 794 (3d Dep't 1949); *Hirsch v. Safian*, 257 App. Div. 212, 12 N.Y.S.2d 568 (1st Dep't 1939); *Frankel v. Wolper*, 181 App. Div. 485, 169 N.Y. Supp. 15 (2d Dep't 1918), aff'd, 228 N.Y. 582, 127 N.E. 913 (1920).

<sup>70</sup> 308 N.Y. 543, 127 N.E.2d 330 (1955); Note, 7 Syracuse L. Rev. 165; Note, 2 N.Y.L.F. 121 (1956); Note, 131 St. John's L. Rev. 123 (1956).

<sup>71</sup> Id. at 546, 127 N.E.2d at 331-32.

<sup>72</sup> 232 App. Div. 278, 249 N.Y. Supp. 514 (1st Dep't 1931).

<sup>73</sup> 308 N.Y. 543, 127 N.E.2d 330 (1955).

<sup>74</sup> *Ranalli v. Breed*, 251 App. Div. 750, 297 N.Y. Supp. 688 (2d Dep't 1937), aff'd, 277 N.Y. 630, 14 N.E.2d 195 (1938).

<sup>75</sup> *Keating v. Perkins*, 250 App. Div. 9, 293 N.Y. Supp. 197 (1st Dep't 1937); *McAlpin v. Browne*, 15 Misc. 2d 255, 181 N.Y.S.2d 525 (Sup. Ct. N.Y. County 1958); *Calabrese v. Bickley*, 208 Misc. 407, 143 N.Y.S.2d 846 (Sup. Ct. N.Y. County 1955), modified, 1 App. Div. 2d 874, 150 N.Y.S.2d 542 (1st Dep't 1956). But see *Horowitz v. Bogart*, supra note 56, and text accompanying notes 56 & 57 supra.

In every case where contract relief is sought, the court will scrutinize the allegations contained in the complaint to ascertain whether the gravamen of the action is indeed contract. The fact that negligence or unskilled treatment are not alleged is not conclusive. The action may still be regarded as one in malpractice despite the absence of such allegations.<sup>76</sup> Likewise, the presence of such allegations indicates that the action is in tort,<sup>77</sup> but this inference is not mandatory.<sup>78</sup> As the Court of Appeals noted in *Robins v. Finestone*:

The fact that the plaintiff alleges that the defendant performed his part of the contract in an "unworkmanlike" and "unskillful" manner does not serve to label the complaint as one stating a cause of action in malpractice only, since it is frequent in breach of contract actions involving the rendition of services for plaintiff to allege that the services were unworkmanlike and unskillful.<sup>79</sup>

The statement of damages alleged is considered much more seriously. The absence of a claim for damages for pain and suffering is a strong indicia that the action is one in contract.<sup>80</sup> Thus, the Court of Appeals, allowing a contract action, observed:

Nowhere in the complaint is there any statement that the plaintiff seeks to recover for his pain and suffering, which would be a relevant and material allegation if it were an action in malpractice. The damages sought are those suited to an action on contract, and help to characterize the complaint as one based upon a contract and not based upon malpractice and negligence.<sup>81</sup>

The presence of such a claim almost always results in a characterization of the suit as one for malpractice.<sup>82</sup> The same result occurs when the plaintiff demands unliquidated damages.<sup>83</sup> Such a demand

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<sup>76</sup> Horowitz v. Bogart, *supra* note 56.

<sup>77</sup> Monahan v. Devlinny, 223 App. Div. 547, 229 N.Y. Supp. 60 (3d Dep't 1928).

<sup>78</sup> Cf. Archibald v. Hill Sanatorium, 121 Misc. 193, 201 N.Y. Supp. 86 (Sup. Ct. N.Y. County 1923).

<sup>79</sup> 308 N.Y. 543, 547, 127 N.E.2d 330, 332 (1955).

<sup>80</sup> Budoff v. Kessler, 2 App. Div. 2d 760, 153 N.Y.S.2d 654 (2d Dep't 1956); Conklin v. Draper, 229 App. Div. 227, 241 N.Y. Supp. 529 (1st Dep't 1930), *aff'd mem.*, 254 N.Y. 620, 173 N.E. 892 (1930).

<sup>81</sup> *Robins v. Finestone*, 308 N.Y. 543, 547, 127 N.E.2d 330, 332 (1955). The court's emphasis upon the absence of a request for damages for pain and suffering should not be read to mean that this omission is conclusive evidence of a contract action. Note, 7 Syracuse L. Rev. 165, 166 (1955). "Although this is a test to determine whether the action is *ex contractu* rather than *ex delicto*," *Hertgen v. Weintraub*, 29 Misc. 2d 396, 397, 215 N.Y.S.2d 379, 381 (Sup. Ct. Kings County 1961), it is not the sole test, and in any event the plaintiff still must establish a special agreement in order to recover in contract. *Ibid.* See also Note, 31 St. John's L. Rev. 123, 125 n.15 (1956).

<sup>82</sup> Horowitz v. Bogart, 218 App. Div. 158, 217 N.Y. Supp. 881 (1st Dep't 1926); Frankel v. Wolper, 181 App. Div. 485, 169 N.Y. Supp. 15 (2d Dep't 1918), *aff'd*, 228 N.Y. 582, 127 N.E. 913 (1920); Hurlburt v. Gillett, 96 Misc. 585, 161 N.Y. Supp. 994 (Sup. Ct. Kings County 1916), *aff'd on opinion below*, 176 App. Div. 893, 162 N.Y. Supp. 1124 (2d Dep't 1916).

<sup>83</sup> *Ibid.*

is not suited to an action for breach of contract. Damages that are recoverable for a breach are sums paid to the defendant, expenditures necessitated for nurses and medicines, and those other damages which naturally flow from the breach of the contract. . . .<sup>84</sup>

Thus, while the contract remedy may be available to an injured patient in certain situations,<sup>85</sup> it affords an inadequate recovery even in these instances.<sup>86</sup> Patently, it represents a modest attempt by the courts to ameliorate the hardships caused by their strict application of the malpractice statute of limitations.<sup>87</sup>

Permitting a contract action has several drawbacks from a physician's standpoint in addition to lengthening his period of potential liability. If a physician makes a special contract and then fails to perform, "he is liable for breach of contract even though he use the highest possible professional skill."<sup>88</sup> The plaintiff's burden of proof is therefore much lighter,<sup>89</sup> since he is not required to prove negligence by means of expert medical testimony,<sup>90</sup> the physician being liable regardless of the degree of care exercised by him.<sup>91</sup> Furthermore, there is the possibility that a physician held liable in contract may not be able to secure indemnifica-

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<sup>84</sup> *Hertgen v. Weintraub*, 29 Misc. 2d 396, 398, 215 N.Y.S.2d 379, 381 (Sup. Ct. Kings County 1961). Other cases discussing the damages recoverable in contract actions include *Keating v. Perkins*, 250 App. Div. 9, 293 N.Y. Supp. 197 (1st Dep't 1937); *Conklin v. Draper*, 229 App. Div. 227, 241 N.Y. Supp. 529 (1st Dep't), *aff'd mem.*, 254 N.Y. 620, 173 N.E. 892 (1930); and *Monahan v. Devinsky*, 223 App. Div. 547, 229 N.Y. Supp. 60 (3d Dep't 1928).

<sup>85</sup> See text accompanying notes 63-75 *supra*.

<sup>86</sup> "The usual contract measure of damages may be suitable for the settlement of rights under normal commercial transactions, but it does not compensate for the disappointment, pain, and suffering resulting from a failure to cure as promised." Note, 7 *Syracuse L. Rev.* 165 (1955).

<sup>87</sup> Of the *Robins* decision one notewriter observed: "This characterization of the complaint [as one in contract] would seem to indicate the Court's awareness of the questionable justice of the time limitation on malpractice actions and its willingness to avoid the harsh result of the application of such a bar to plaintiff's action." Note, 31 *St. John's L. Rev.* 123, 125 (1956). Compare *Miller*, *supra* note 51, at 430.

<sup>88</sup> *Safian v. Aetna Life Ins. Co.*, 260 App. Div. 765, 768, 24 N.Y.S.2d 92, 95 (1st Dep't 1940), *aff'd*, 286 N.Y. 649, 36 N.E.2d 692 (1941); Note, 10 *Brooklyn L. Rev.* 411. See also *Miller*, *supra* note 51, at 417.

<sup>89</sup> It has been advanced that "a judge and jury often feel that no matter what the doctor says, the patient is to be believed when he or she testifies that the doctor promised a perfect end result." *Martin*, *supra* note 30, at 461. The validity of this statement is doubtful. Most reported contract actions in New York arise on motion. In the only reported trial court opinion following the sustaining of a contract complaint on appeal, decided one year after *Martin's* article, the trial court held that the alleged contract was not proved and dismissed the complaint. *Robins v. Feinstein*, 155 N.Y.S.2d 562 (Sup. Ct. N.Y. County 1956). The plaintiff's burden of proof is lighter, but not because he finds it easier to establish a special agreement. See note 90 *infra*.

<sup>90</sup> The medical profession is well aware that a contract action "enables the plaintiff to dispense with the necessity of obtaining expert medical testimony in proving his ease." *Sandor*, "The History of Professional Liability Suits in the United States," 163 *J.A.M.A.* 459, 466 (1957).

<sup>91</sup> *Keating v. Perkins*, 250 App. Div. 9, 293 N.Y. Supp. 197 (1st Dep't 1937). "Strained construction of a contract in the instant case supplants proof of negligence in a situation traditionally considered tort. Thus absolute liability is imposed, for the defense by proof of due care is precluded. . . ." Note, 5 *U. Chi. L. Rev.* 156, 157 (1937).

tion from his insurance company under a policy insuring him against malpractice, error, or mistake.<sup>92</sup> In the past, many policies have contained provisions expressly disclaiming liability for claims on account of any special contract, guarantee, or warranty.<sup>93</sup>

### *Fraud Action*

The contract remedy sometimes provides a limited amount of relief in cases where the patient does not become aware of his injury within the two year malpractice period. Similar attempts to frame an action in fraud, in order to take advantage of the six year fraud statute which runs from the time of the discovery of the facts constituting the fraud,<sup>94</sup> have been unsuccessful.<sup>95</sup> The courts have held repeatedly that, where the injury is caused by the negligence of a physician, his subsequent concealment, even if intentional, is at most an aggravation of the injury and does not support a separate action for fraud<sup>96</sup> or deceit.<sup>97</sup> The physician's failure to disclose his negligent act is a breach of his professional duty, but a breach which only constitutes malpractice.<sup>98</sup>

The first attempt to circumvent the malpractice statute via the fraud approach occurred in *Tulloch v. Haselo*,<sup>99</sup> where during an extraction a dentist allegedly allowed a tooth to fall down plaintiff's throat into her lung. He concealed his act of malpractice from the plaintiff,<sup>100</sup> who

<sup>92</sup> *Safian v. Aetna Life Ins. Co.*, 260 App. Div. 765, 24 N.Y.S.2d 92 (1st Dep't 1940), aff'd, 286 N.Y. 649, 36 N.E.2d 692 (1941). Cf. *Strauss v. New Amsterdam Cas. Co.*, 30 Misc. 2d 345, — N.Y.S.2d — (N.Y. Munic. Ct. 1961).

<sup>93</sup> Note, 10 Brooklyn L. Rev. 411, 413 (1941).

<sup>94</sup> N.Y. Civ. Prac. Act § 48(5).

<sup>95</sup> *Hammer v. Rosen*, 7 N.Y.2d 376, 165 N.E.2d 756, 198 N.Y.S.2d 65 (1960) (dismissal of fraud count affirmed).

<sup>96</sup> *Tulloch v. Haselo*, 218 App. Div. 313, 218 N.Y. Supp. 139 (3d Dep't 1926).

<sup>97</sup> *Calabrese v. Bickley*, 208 Misc. 407, 143 N.Y.S.2d 846 (Sup. Ct. N.Y. County 1955), modified, 1 App. Div. 2d 874, 150 N.Y.S.2d 542 (1st Dep't 1956). But see *McAlpin v. Browne*, 15 Misc. 2d 255, 181 N.Y.S.2d 525 (Sup. Ct. N.Y. County 1958), where the court speaks of "deceit" while apparently sustaining a contract action.

<sup>98</sup> *Kleinman v. Lack*, 6 App. Div. 2d 1046, 179 N.Y.S.2d 194 (2d Dep't 1958). Cf. *Golia v. Health Ins. Plan of Greater N.Y.*, 6 App. Div. 2d 884, 177 N.Y.S.2d 550 (2d Dep't 1958), aff'd mem., 7 N.Y.2d 931, 165 N.E.2d 578, 197 N.Y.S.2d 735 (1960).

<sup>99</sup> 218 App. Div. 313, 218 N.Y. Supp. 139 (3d Dep't 1926).

<sup>100</sup> The court stressed the absence of an allegation that the dentist knew that the tooth had lodged in plaintiff's lung. He might have assumed, the court reasoned, that the tooth had entered her stomach and passed through her system. "There is nothing alleged from which we may infer any intentional fraudulent misrepresentation of fact as to the presence of a tooth in the lung resulting from letting it fall down her throat." *Tulloch v. Haselo*, supra note 99, at 315, 218 N.Y. Supp. at 141. The distinction, based upon whether the dentist knew for certain that his negligent act would cause damage, seems unwarranted. "Thus did the court advise the negligent dentist of the reward for silence and the continued breach of duty in not informing the plaintiff of the possible disastrous effect of the treatment." *Reich*, supra note 15, at 191. The possibility of a fraud action when the physician knows that his negligent act will cause damage and yet conceals the same is unlikely in view of *Calabrese v. Bickley*, 208 Misc. 407, 143 N.Y.S.2d 846 (Sup. Ct. N.Y. County 1955), modified, 1 App. Div. 2d 874, 150 N.Y.S.2d 542 (1st Dep't 1956). Cf. *Conklin v. Draper*, 229 App. Div. 227, 241 N.Y. Supp. 529 (1st Dep't), aff'd mem., 254 N.Y. 620, 173 N.E. 892 (1930) (physician's knowledge that he left forceps in plaintiff's abdomen and his concealment thereof held not to toll malpractice statute of limitations).

discovered it nearly three years after her last treatment by the dentist.<sup>101</sup> The court brushed aside plaintiff's contention that her complaint stated a cause of action for fraud.

The concealment alleged is not the wrong which must be made the gravamen of an "action to procure a judgment on the ground of fraud" within Civil Practice Act, section 48. . . . It was malpractice that was the proximate cause of the injury which the plaintiff sustained. The failure to speak and to disclose his negligent act was a breach of duty which constituted malpractice.<sup>102</sup>

More recently, in a fraud action brought against a physician who had informed a patient that he had successfully removed her gall bladder, when in fact he had failed to do so, the court reiterated this view.

As malpractice covers every way in which a patient is injured through the dereliction of a doctor in his professional capacity, the approach, depending on the facts, can be through any of several familiar forms of action. But no matter what the approach, it remains an action for malpractice, not one for deceit, contract or anything else. A well-recognized ground for recovery is where a physician represents that he has the skill to perform a certain operation when in fact he does not. This form of action requires the same elements of proof that an action in fraud requires, yet it could not be successfully disputed that as between the two it is an action for malpractice. Where, as here, the fraud consists in concealing the malpractice, it has been held that the gravamen is the malpractice and the concealment merely an item in [the] chain of circumstances causing the damage. . . .<sup>103</sup>

In much the same way that a fraudulent concealment of malpractice does not give rise to an independent fraud action, neither does it toll the malpractice statute of limitations.<sup>104</sup> Similarly, the courts have rejected the argument that the doctrine of equitable estoppel should be invoked in concealment cases.<sup>105</sup> An attempt to frame a conspiracy action also has met with failure.<sup>106</sup>

#### RELATED STATUTES

Section 50-d of the General Municipal Law, enacted in 1937, provided that municipal corporations should assume liability for the malpractice

<sup>101</sup> Thereby precluding use of the continuous treatment theory. *Quaere*: would not a contract action now be feasible? See *Keating v. Perkins*, 250 App. Div. 9, 293 N.Y. Supp. 197 (1st Dep't 1937).

<sup>102</sup> *Tulloch v. Haselo*, supra note 99, at 316-17, 218 N.Y. Supp. at 142.

<sup>103</sup> *Calabrese v. Bickley*, 208 Misc. 407, 408-09, 143 N.Y.S.2d 846, 848 (Sup. Ct. N.Y. County 1955), modified, 1 App. Div. 2d 874, 150 N.Y.S.2d 542 (1st Dep't 1956).

<sup>104</sup> "Alleged fraud in concealing the injury does not preclude pleading the statute of limitations. . . ." *Kleinnan v. Lack*, 6 App. Div. 2d 1046, 179 N.Y.S.2d 194 (2d Dep't 1958). See text at note 21 supra. See generally Dawson, "Fraudulent Concealment and Statutes of Limitation," 31 Mich. L. Rev. 875, 904-06 (1933).

<sup>105</sup> "It would be a dangerous precedent to establish to hold that equity should interpose against the Statute of Limitations in a malpractice case. . . ." *Tulloch v. Haselo*, supra note 99, at 317, 218 N.Y. Supp. at 143.

<sup>106</sup> *Numme v. Crescenzi*, 144 N.Y.S.2d 145 (Sup. Ct. Westchester County 1955).



of physicians or dentists rendering services gratuitously to persons in public institutions maintained in whole or in part by municipal corporations.<sup>107</sup> As Judge (then Justice) Van Voorhis observed, the "object of this statute was evidently to encourage physicians and dentists to donate their services rendered to patients in public institutions by indemnifying them against claims for malpractice."<sup>108</sup> Under the section an "action may be instituted against either the doctor or the city or both. . . ."<sup>109</sup>

While the section has been substantially broadened in scope during the past twenty-five years,<sup>110</sup> the most important problem from the limitation-of-actions viewpoint has escaped legislative revision. The right of action granted by section 50-d has always been conditioned upon a prompt notification of claim and commencement of suit. The section, vouching in section 50-e, provides that notice of claim must be given within ninety days after the claim arises. Similarly, section 50-i now prescribes a period of one year and ninety days within which an action against a municipality must be commenced. Hence, in cases where an injured patient seeks to hold the municipality liable, he is subject to extremely rigorous time limitations which often prevent any chance of relief.<sup>111</sup>

The use of stringent notice and suit requirements where potential municipal liability is concerned is common. What is unusual, and extremely hard on plaintiffs, is that the courts have also applied these

<sup>107</sup> N.Y. Sess. Laws 1937, ch. 483, § 1; as amended, N.Y. Sess. Laws 1945, ch. 694, § 3; N.Y. Sess. Laws 1950, ch. 681, § 1; N.Y. Sess. Laws 1956, ch. 514, § 1; N.Y. Sess. Laws 1956, ch. 897, § 1. Repealed and re-enacted by N.Y. Sess. Laws 1960, ch. 188, § 1.

<sup>108</sup> *Schmid v. Werner*, 277 App. Div. 520, 524, 100 N.Y.S.2d 860, 864 (1st Dep't 1950), *aff'd*, 303 N.Y. 754, 103 N.E.2d 540 (1952).

<sup>109</sup> *Matter of Polk v. City of New York*, 188 Misc. 727, 71 N.Y.S.2d 294, 295 (Sup. Ct. N.Y. County 1947). Actions against physician: *Derlicka v. Leo*, 281 N.Y. 266, 22 N.E.2d 367 (1939), 10 Brooklyn L. Rev. 213 (1940); *Martinez v. Modica*, 191 Misc. 836, 80 N.Y.S.2d 132 (Sup. Ct. N.Y. County 1948); *Barnes v. Gardner*, 170 Misc. 604, 9 N.Y.S.2d 785 (Sup. Ct. Kings County 1939). Actions against municipality: *Schmid v. Werner*, *supra* note 108; *Steele v. City of New York*, 12 Misc. 2d 605, 177 N.Y.S.2d 816 (Sup. Ct. N.Y. County 1958). Actions against both: *Mackrell v. City of New York*, 183 Misc. 1036, 52 N.Y.S.2d 844 (Sup. Ct. Queens County 1944). A notewriter, commenting upon *Schmid v. Werner*, *supra*, noted that "the appellate division held that the statute did not subject the city to such a direct action. . . ." Note, 61 Colum. L. Rev. 871, 890 (1961). But in the case the Appellate Division stated: "In cases where the services have been rendered gratuitously by the physician or dentist, it appears to have been the intention of section 50-d to enable the patient to sue the city directly, thus avoiding the circuitry of action involved in suing the doctor first and then permitting him to recover over against the municipality." *Schmid v. Werner*, *supra* note 108, at 524-25, 100 N.Y.S.2d at 864. While the city was not held liable, it was because the physician had not given his services gratuitously to the hospital, thereby taking the city out of Section 50-d as it then stood, rather than because the section forbids a direct action.

<sup>110</sup> See text accompanying notes 118-23 *infra*.

<sup>111</sup> See, e.g., *Steele v. City of New York*, 12 Misc. 2d 605, 177 N.Y.S.2d 816 (Sup. Ct. N.Y. County 1958). But see *Borgia v. City of New York*, — Misc. 2d —, 216 N.Y.S.2d 897 (Sup. Ct. Kings County 1961).

requirements to actions brought against physicians covered by section 50-d.<sup>112</sup> The Court of Appeals in *Derlicka v. Leo*,<sup>113</sup> impliedly overruling a lower court decision holding that the malpractice statute of limitations applied to actions wherein a municipality was not made a defendant,<sup>114</sup> took the position that section 50-d cuts the two-year malpractice statute down to municipal size even when the physician is the sole defendant. In a per curiam opinion the court stated:

Section 50-d creates a new remedy against the city in favor of the injured person. The liability which existed at common law may still be enforced by action against the physician, but the physician would have a right to insist that in accordance with the statute he be saved harmless by the municipal corporation. The effect of any action, whether brought against the municipality or against the physician or dentist, is determined by the provisions of the statute and, by the express terms of the statute, may be maintained only if "the applicable provisions of law pertaining to the commencement of action and filing of notice . . . against such municipal corporation shall be strictly complied with."<sup>115</sup>

Where the patient cannot satisfy the rigid requirements of section 50-d, 50-e and 50-i, then, he not only finds himself precluded from holding the municipality liable,<sup>116</sup> but he is barred from suing the very physician whose malpractice is the basis of his action. As one commentator observed: "The court insists that the common law right of action against the doctor has not been abrogated, but the Statute of Limitations on such an action has been sliced in half."<sup>117</sup>

Amendments to the section have broadened its protective coverage, simultaneously increasing the situations where the short notice and action requirements apply to actions against individual physicians. As it was first enacted, section 50-d applied only where a physician or dentist rendered services "gratuitously." As the court stated in *Schmid v. Werner*.<sup>118</sup>

<sup>112</sup> See, e.g., *Matter of Griffin v. Cumberland Hosp.*, 20 Misc. 2d 639, 640, 194 N.Y.S.2d 82, 83 (Sup. Ct. Kings County 1959).

<sup>113</sup> 281 N.Y. 266, 22 N.E.2d 367 (1939).

<sup>114</sup> [I]n whittling down the immunity the Legislature prescribed certain conditions as to limitation of time and notice such as are customary when municipalities are sued. There is nowhere manifested any attempt to interfere with, modify or repeal other general Statutes of Limitation in suits against individuals. Section 50-d . . . specifically refers to an action brought "under this section." The action is not brought under that section.

*Barnes v. Gardner*, 170 Misc. 604, 606, 9 N.Y.S.2d 785, 787 (Sup. Ct. Kings County 1939).

<sup>115</sup> *Derlicka v. Leo*, supra note 113, at 268-69, 22 N.E.2d at 368.

<sup>116</sup> Plaintiffs who have satisfied the notice requirement in direct actions against the municipality have been met with the extreme argument that their actions were barred because they had failed to serve the physician with a notice of claim. Such service is unnecessary. *Matter of Polk v. City of New York*, supra note 109. Thus, while a notice of claim must be filed upon the municipality before commencement of an action either against it or the physician, where the action is against the municipality alone no notice need be served upon the physician.

<sup>117</sup> Note, 10 Brooklyn L. Rev. 213, 216 (1940).

<sup>118</sup> 277 App. Div. 520, 524, 100 N.Y.S.2d 860, 864 (1st Dep't 1950), aff'd, 303 N.Y. 754,

If the doctor is paid or to be paid by the city, then, regardless of whether the patient reimburses the municipality, he may sue the doctor untrammelled by section 50-d of the General Municipal Law. . . .

Of course, in such cases the patient could not maintain an action against the municipality.

In 1956, section 50-d was amended to reverse the result of the above case and to impose liability upon a municipality for the negligence "of any resident physician, physician, interne, dentist or podiatrist rendering medical, dental or podiatry services of any kind to a person *without receiving compensation from such person*. . . ."<sup>119</sup> The purpose of the amendment, sponsored by the Medical Society of the State of New York, was to extend section 50-d coverage to internes and resident physicians who receive only a nominal honorarium for their services and find it hard to procure malpractice insurance.<sup>120</sup> Obviously, this purpose differs from the intent underlying the original section, which was to encourage physicians to donate their services to municipal hospitals,<sup>121</sup> and the amendment was opposed by the New York State Bar Association<sup>122</sup> and the State Comptroller<sup>123</sup> for this reason.

Whether one agrees with the amendment or not, its effect is to widen the area where direct actions may be brought against a municipality and, concomitantly, to permit a larger class of medical personnel to avail themselves of the short municipal notice and limitation periods in actions brought directly against them. In short, where a patient is injured by a paid or unpaid physician, interne, dentist, or podiatrist working in a

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103 N.E.2d 540 (1952). See also *Martinez v. Modica*, 191 Misc. 836, 80 N.Y.S.2d 132 (Sup. Ct. N.Y. County 1948) and *Mackrell v. City of New York*, 183 Misc. 1036, 52 N.Y.S.2d 844 (Sup. Ct. Queens County 1944).

<sup>119</sup> N.Y. Sess. Laws 1956, ch. 897, § 1 (emphasis added). Podiatrists had been added by N.Y. Sess. Laws 1956, ch. 514, § 1.

<sup>120</sup> Letter from Dr. Harold B. Smith, Executive Officer, Medical Society of the State of New York, to Hon. Daniel Gutman, Counsel to the Governor, March 21, 1956.

<sup>121</sup> See text accompanying note 108 *supra*.

<sup>122</sup> The bill represents a change in purpose from that of encouraging the performance of gratuitous services in public institutions by eminent physicians and dentists to that of increasing the liability of municipalities. There seems no more reason now to protect resident physicians, internes and dentists, gainfully employed in a municipal hospital, against liability for their own negligence at the expense of municipal taxpayers than there was when section 50-d was originally enacted.

Report, N.Y. State Bar Ass'n Comm. on State Legislation No. 105 (1956).

<sup>123</sup> The bill appears to extend the coverage of section 50-d far beyond what was intended by the original enactment. In the first place, it fails to define a "resident physician" leaving that term open to the possible inclusion of all physicians other than internes on the payroll of the institution. Furthermore, the bill would include within the coverage of the statute "any other physician" rendering services without receiving compensation from the patient. This could be construed to mean any physician on the staff of the hospital, including those receiving relatively large salaries and those whose experience has been sufficiently long and reputations sufficiently good to enable them to receive insurance coverage.

Letter From Hon. Arthur Levitt, State Comptroller, to Hon. Averell Harriman, Governor, April 10, 1956.

municipal institution, he must satisfy these requirements unless he has directly compensated the medical man involved. Only then, in the one instance when he may not maintain an action against the municipality, is he still subject to the malpractice statute of limitations when suing the negligent individual.

#### JURISPRUDENCE OF OTHER STATES<sup>124</sup>

Only sixteen states, other than New York, have statutes of limitation specifically applicable to malpractice actions.<sup>125</sup> These provisions commonly refer to actions for "malpractice, error or mistake,"<sup>126</sup> although some add actions for "failure to cure" to this listing.<sup>127</sup> Two-thirds of the states have no specific limitation period. Of these, most classify actions for malpractice as personal injury actions and apply this statute to them.<sup>128</sup> The remainder either place malpractice actions under provisions relating to actions for which no other limitation period is enumerated<sup>129</sup> or under one of a number of miscellaneous provisions.<sup>130</sup> The time periods in which to commence malpractice actions vary from one to six years.<sup>131</sup> More than one-half the states have two year statutes.<sup>132</sup>

#### *Computation of Time*

Wide variations exist among the states on several highly important matters aside from the type and length of the applicable statute. The first and most important variation concerns when the statute starts running. About one-half of the statutes, both those expressly applicable and those construed as applicable to malpractice actions, provide that

<sup>124</sup> Capsule summaries of the law of the other forty-nine states and the District of Columbia are found in Louisell & Williams, *supra* note 40, at 363-415.

<sup>125</sup> See the Appendices for the text of these statutes, together with citations to the applicable statutes of other states. Specific statutory citations will not be given in the footnotes that follow. Reference should be made to the Appendices if a citation is desired.

<sup>126</sup> See the statutes of Alabama, Arkansas, Massachusetts, Minnesota, Missouri and South Dakota.

<sup>127</sup> See the statutes of the states listed at note 126 *supra*, with the exception of Massachusetts and Missouri.

<sup>128</sup> Alaska, Arizona, California, Delaware, Georgia, Hawaii, Idaho, Illinois, Iowa, Nevada, New Jersey, New Mexico, North Carolina, Oregon, Pennsylvania, Rhode Island, Tennessee, Texas, Vermont, Virginia (doubtful), Washington, West Virginia and Wisconsin.

<sup>129</sup> District of Columbia, Florida, Mississippi, South Carolina, Utah and Virginia (doubtful).

<sup>130</sup> Kansas (injury to rights of another not arising on contract or otherwise provided for), Louisiana (offenses or quasi-offenses), Maryland (actions on the case), Montana (non-contractual obligation or liability not founded on an instrument in writing), Oklahoma (same as Kansas, *supra*) and Wyoming (same as Kansas, *supra*).

<sup>131</sup> One year: California, Kentucky, Louisiana, Ohio, Tennessee and Virginia. Three years: District of Columbia, Maryland, Montana, Nebraska, New Mexico, North Carolina, Vermont, Washington and Wisconsin. Four years: Florida, Utah and Wyoming.

<sup>132</sup> Alabama, Alaska, Arizona, Arkansas, Colorado, Delaware, Georgia, Hawaii, Idaho, Indiana, Iowa, Kansas, Maine, Massachusetts, Michigan, Minnesota, Montana, Nevada, New Jersey, New Hampshire, North Dakota, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Dakota, Texas, Virginia and West Virginia.

the action must be commenced within the given number of years after the cause of action accrues.<sup>133</sup> Many statutes simply state that the action must be commenced within so many years, giving no guidance at all as to the time from which the period is to be computed.<sup>134</sup> A few states have statutes which specify that the cause of action accrues or the statute begins to run from the date of the act or omission constituting the negligence,<sup>135</sup> the date when the injury was sustained,<sup>136</sup> or the date when the injury was or should reasonably have been discovered.<sup>137</sup>

Of those states having statutes which do not define the time of accrual, all but four which have passed upon the question have taken the position that the cause of action accrues, *i.e.* the statute begins to run, at the time of the wrongful act which constitutes the alleged malpractice and not when the injury is manifested or discovered.<sup>138</sup> The rationale behind this view was well stated by the Supreme Judicial Court of Massachusetts in the leading case of *Cappuci v. Barone*:<sup>139</sup>

Any act of misconduct or negligence on his [the physician's] part in the service undertaken . . . gave rise to a right of action . . . and the statutory period began to run at that time, and not when the actual damage results or is ascertained, as the plaintiff contends. The damage sustained by the wrong done is not the cause of action; and the statute is a bar to the original cause of action although the damages may be nominal, and to all the consequential damages resulting from it though such damages may be substantial and not foreseen.

On the other hand, California,<sup>140</sup> Florida,<sup>141</sup> Louisiana and New

<sup>133</sup> Arizona, Colorado, District of Columbia, Georgia, Hawaii, Illinois, Iowa, Kansas, Kentucky, Maryland, Massachusetts, Maine, Michigan, Mississippi, New Hampshire, New Jersey, North Dakota, Ohio, Oklahoma, Rhode Island, South Dakota, Tennessee, Texas, Vermont, Virginia and West Virginia.

<sup>134</sup> Alaska, California, Florida, Idaho, Louisiana, Minnesota, Montana, Nebraska, Nevada, New Mexico, North Carolina, Oregon, South Carolina, Utah, Washington, Wisconsin and Wyoming.

<sup>135</sup> Arkansas and Indiana.

<sup>136</sup> Delaware and Pennsylvania.

<sup>137</sup> Alabama and Connecticut.

<sup>138</sup> *Summers v. Wallace Hosp.*, 276 F.2d 831 (9th Cir. 1960); *Tessier v. United States*, 269 F.2d 305 (1st Cir. 1959); *Silvertooth v. Shallenberger*, 49 Ga. App. 133, 174 S.E. 365 (1934); *Gangloff v. Apfelbach*, 319 Ill. App. 596, 49 N.E.2d 795 (1943); *Ogg v. Robb*, 181 Iowa 145, 162 N.W. 217 (1917); *Waddell v. Woods*, 160 Kan. 481, 163 P.2d 348 (1945); *Carter v. Harlan Hosp. Ass'n*, 265 Ky. 452, 97 S.W.2d 9 (1936); *Hahn v. Claybrook*, 130 Md. 179, 100 Atl. 83 (1917); *Wilder v. St. Joseph Hosp.*, 225 Miss. 42, 82 So. 2d 651 (1955); *Coady v. Reins*, 1 Mont. 424 (1872); *Lewis v. Shaver*, 236 N.C. 510, 73 S.E.2d 320 (1952); *DeLong v. Campbell*, 157 Ohio St. 22, 104 N.E.2d 177 (1952); *Shives v. Chamberlain*, 168 Ore. 676, 126 P.2d 28 (1942); *Hinkle v. Hargens*, 76 S.D. 520, 81 N.W.2d 888 (1957); *Albert v. Sherman*, 167 Tenn. 133, 67 S.W.2d 140 (1934); *Carrell v. Denton*, 138 Tex. 145, 157 S.W.2d 878 (1942); *Peteler v. Robison*, 81 Utah 535, 17 P.2d 244 (1932); *Murray v. Allen*, 103 Vt. 373, 154 Atl. 678 (1931); *Lindquist v. Mullen*, 45 Wash. 2d 675, 277 P.2d 724 (1954); *Gray v. Wright*, 142 W. Va. 490, 96 S.E.2d 671 (1957); *Lotten v. O'Brien*, 146 Wis. 258, 131 N.W. 361 (1911).

<sup>139</sup> 266 Mass. 578, 581, 165 N.E. 653, 654-55 (1919).

<sup>140</sup> *Stafford v. Schultz*, 42 Cal. 2d 767, 270 P.2d 1 (1954); *Tell v. Taylor*, 12 Cal. Rptr. 648 (Dist. Ct. App. 1st Dist. 1961); *Costa v. Regents of Univ. of Cal.*, 116 Cal. App. 2d 445, 254 P.2d 85 (1953).

<sup>141</sup> *City of Miami v. Brooks*, 70 So. 2d 306 (Fla. 1954).

Jersey,<sup>142</sup> under substantially similar statutes, have espoused the so-called minority rule that the statute of limitations does not begin running until the patient discovers or, in the exercise of reasonable diligence, should have discovered the injury. This approach is, of course, an effort to avoid some of the potentially harsh consequences of the majority accrual rule especially where the malpractice is not easily discoverable. As described by a dissenting justice in Washington, a state following the majority rule, it is based essentially on considerations of justice:

Until the discovery of the sponge in her body . . . the plaintiff did not know, and apparently the defendant doctor did not know, that the patient had any basis for a cause of action. . . . To say that the patient had a cause of action all the while, *although no one knew about it or suspected it*, may meet some tests of legal logic or theory; but the result would hardly meet the tests of abstract, generally applicable, or lay standards of justice.<sup>143</sup>

The same result that has been reached in the above four states by judicial construction has been achieved in Alabama, Connecticut, and Missouri by legislative enactment. The Missouri statute requires that the action "be brought within two years from the date of the act of neglect complained of . . .," but another, general statute tolls its running until the damage is "sustained and is capable of ascertainment. . . ."<sup>144</sup> A plaintiff in Alabama has two years from the negligent act or omission in which to sue but, if the cause of action is not reasonably discoverable within that period, he then is given six months from the date of discovery of the cause of action or of facts which would reasonably lead to such discovery. An absolute outside limit of six years from the negligent act is imposed. Connecticut's limitation period is one year from the date the injury is discovered or in the exercise of reasonable care should have been discovered, with an outside limit of three years from the date of negligent act or omission.

Interesting variants appear in the statutes of Delaware and Pennsylvania. Delaware starts its statute running from the date when the "injuries were sustained," while Pennsylvania's provision specifies a period "from the time when the injury was done." Delaware has not decided whether it will follow the majority or minority accrual rule. Pennsylvania, in *Ayers v. Morgan*,<sup>145</sup> held that where a physician negligently

<sup>142</sup> *Perrin v. Rodriguez*, 153 So. 555 (La. App. 1934); *Fernandi v. Strully*, 35 N.J. 434, 173 A.2d 277 (1961); Note, 41 B.U.L. Rev. 569. Michigan may soon join this group. See *Eschenbacher v. Hier*, 363 Mich. 676, 110 N.W.2d 731 (1961).

<sup>143</sup> *Lindquist v. Mullen*, 45 Wash. 2d 675, 682-83, 277 P.2d 724, 728 (1954).

<sup>144</sup> Mo. Ann. Stat. § 516.100 (1952). Cf. *Thatcher v. De Tar*, 351 Mo. 603, 173 S.W.2d 760 (1943), 9 Mo. L. Rev. 102 (1944) (continuous treatment involved).

<sup>145</sup> 397 Pa. 282, 154 A.2d 788 (1959), 5 Vill. L. Rev. 495 (1960).

left a sponge in a patient's body during an operation the injury was "done" when, nine years later, the patient discovered its presence.

The statutes of Arkansas and Indiana seemingly preclude any possible construction allowing the period to run from the time of discovery; both expressly declare that the action must be brought within two years of the negligent act.

As the above discussion demonstrates, some judicial and a few legislative inroads have been made in the majority view. Nevertheless, a substantial majority of states follow the rule that the applicable statute runs from the date of negligence rather than discovery, with a small though increasing number taking the opposite view. The trend in this direction is no longer glacial, but it is far from swift.

### *Continuous Treatment*

The earliest attempts to circumvent the malpractice statutes involved the use of the continuous treatment theory. In *Gillette v. Tucker*,<sup>146</sup> the Supreme Court of Ohio ruled that where a physician negligently left a sponge in an incision during an operation, and continued to treat the patient thereafter, the statute of limitations ran from the termination of the physician-patient relationship.<sup>147</sup> The court reasoned:

There was a continuous obligation upon the [physician] . . . , so long as the relation or employment continued, and each day's failure to remove the sponge was a fresh breach of the contract implied by the law. The removal of the sponge was a part of the operation, and in this respect the surgeon left the operation uncompleted.<sup>148</sup>

Most states have adopted some variant of this theory as a means of postponing the running of the malpractice statute.<sup>149</sup> A few states have rejected it.<sup>150</sup> Among those jurisdictions recognizing the continuous treatment exception, there is some difference of opinion as to the

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<sup>146</sup> 67 Ohio St. 106, 65 N.E. 865 (1902).

<sup>147</sup> While the court spoke of continuous treatment, it held that the termination of the relationship, not the end of the treatment, started the statute running. In most cases the two dates are the same, but problems sometimes arise. Thus Minnesota, in *Schmit v. Esser*, 183 Minn. 354, 236 N.W. 622 (1931), took the position that the date of the last treatment controls. See Note, 20 Minn. L. Rev. 96, 97 (1935).

<sup>148</sup> *Gillette v. Tucker*, supra note 146, at 133, 65 N.E. at 872.

<sup>149</sup> *Summers v. Wallace Hosp.*, 276 F.2d 831 (9th Cir. 1960); *Burton v. Tribble*, 189 Ark. 58, 70 S.W.2d 503 (1934); *Mock v. Santa Monica Hosp.*, 9 Cal. Rptr. 555 (Dist. Ct. App. 2d Dist. 1960); *Silvertooth v. Shallenberger*, 49 Ga. App. 758, 176 S.E. 829 (1934); *Buchanan v. Kull*, 323 Mich. 381, 35 N.W.2d 351 (1949); *Couillard v. Charles T. Miller Hosp., Inc.*, 253 Minn. 418, 92 N.W.2d 96 (1958); *Thatcher v. De Tar*, 351 Mo. 603, 173 S.W.2d 760 (1943); *Williams v. Elias*, 140 Neb. 656, 1 N.W.2d 121 (1941); *Tortorello v. Reinfeld*, 6 N.J. 58, 77 A.2d 240 (1950); *Hotelling v. Walther*, 169 Or. 559, 130 P.2d 944 (1942); *Peteler v. Robison*, 81 Utah 535, 17 P.2d 244 (1932); *Murray v. Allen*, 103 Vt. 373, 154 Atl. 678 (1931).

<sup>150</sup> *Gangloff v. Apfelfach*, 319 Ill. App. 596, 49 N.E.2d 795 (1943); *Becker v. Floersch*, 153 Kan. 374, 110 P.2d 752 (1941); *Shearin v. Lloyd*, 246 N.C. 363, 98 S.E.2d 508 (1957); *McCoy v. Stevens*, 182 Wash. 55, 44 P.2d 797 (1935).

character of the subsequent treatment required. Minnesota<sup>151</sup> and Nebraska,<sup>152</sup> for instance, hold that the malpractice statute runs from the date of the last treatment, any type of treatment apparently being sufficient. New Jersey<sup>153</sup> and Oregon,<sup>154</sup> on the other hand, require that the later treatment itself be negligent to postpone the running of the statute.

The continuous treatment theory is generally rationalized on one or more of three grounds: (1) the treatment of an ailment must be considered as a whole;<sup>155</sup> (2) the failure to rectify the negligent act constituting malpractice is really continuing negligence giving rise to a single cause of action;<sup>156</sup> and (3) the patient, while the treatment continues, relies completely on his physician and is under no duty to inquire into the effectiveness of the latter's measures.<sup>157</sup> No matter what its justification, the theory remains an attempt to ameliorate in certain situations the potentially harsh result of the majority accrual rule.

### *Contract Action*

In almost all states the contract statute of limitations is longer than the statute applicable to malpractice actions. Therefore, patients frequently attempt to frame their complaints in contract when the time within which to bring a malpractice action has expired. Three jurisdictions once took the position that an action against a physician always sounded in contract because the malpractice alleged was a breach of the employment agreement.<sup>158</sup> One of these, Florida, now appears to be the only state which gives a plaintiff an election of remedies in every case. He may sue for malpractice or breach of contract and the appropriate statute will attach, for "the statutory period applicable to a malpractice suit depends on the claim for relief stated by plaintiff. . . ."<sup>159</sup> Kentucky and Minnesota, the other two states, have adopted specific malpractice

<sup>151</sup> *Couillard v. Charles T. Miller Hosp., Inc.*, 253 Minn. 418, 92 N.W.2d 96 (1948); *Schanil v. Branton*, 181 Minn. 381, 232 N.W. 708 (1930); *Bush v. Cress*, 178 Minn. 482, 227 N.W. 432 (1929).

<sup>152</sup> *Williams v. Elias*, 140 Neb. 656, 1 N.W.2d 121 (1941).

<sup>153</sup> *Tortorello v. Reinfield*, 6 N.J. 58, 77 A.2d 240 (1950). But see note 142 supra.

<sup>154</sup> *Hotelling v. Walther*, 169 Or. 559, 130 P.2d 944 (1942) (failure to remedy negligent act makes continuous treatment "negligent").

<sup>155</sup> *Williams v. Elias*, 140 Neb. 656, 1 N.W.2d 121 (1941); *Peteler v. Robinson*, 81 Utah 535, 17 P.2d 244 (1932).

<sup>156</sup> *Burton v. Tribble*, 189 Ark. 58, 70 S.W.2d 503 (1934); *Silvertooth v. Shallenberger*, 49 Ga. App. 758, 176 S.E. 829 (1934); *Gillette v. Tucker*, 67 Ohio St. 106, 65 N.E. 854 (1902).

<sup>157</sup> *Buchanan v. Kull*, 323 Mich. 381, 35 N.W.2d 351 (1949); *De Haan v. Winter*, 258 Mich. 293, 241 N.W. 923 (1932).

<sup>158</sup> *Slaughter v. Tyler*, 126 Fla. 515, 171 So. 320 (1936); *Palmer v. Jackson*, 62 Fla. 249, 57 So. 240 (1911); *Menefee v. Alexander*, 107 Ky. 279, 53 S.W. 653 (1899); *Burke v. Mayland*, 149 Minn. 481, 184 N.W. 32 (1921); *Finch v. Bursheim*, 122 Minn. 152, 142 N.W. 143 (1913).

<sup>159</sup> *Manning v. Serrano*, 97 So. 2d 688, 690 (Fla. 1957).



statutes which have been construed to prevent application of the contract limitation period to all malpractice actions.<sup>160</sup> Indeed, in most states having a specific malpractice statute of limitations it has been held:

[A] statute of limitation relating specifically to those engaged in the practice of the healing arts . . . shall govern in all actions against physicians and surgeons growing out of their practice and regardless of the form thereof.<sup>161</sup>

In jurisdictions having no malpractice statute various approaches emerge. At least two states, before they enacted malpractice statutes, apparently took the view that any action framed in contract would be governed by the contract limitation period.<sup>162</sup> Several states deem the contract statute applicable if the "act complained of is a breach of specific terms of the contract, without any reference to the legal duties imposed by law upon the relationship,"<sup>163</sup> but they do not apply it if the duty breached arises from and is "inseparable from the nature and exercise of his [the physician's] calling and . . . is predicated by the law on the relation which exists between physician and patient. . . ."<sup>164</sup> Finally, a sizeable number of these states have rejected the contract theory, or at least its availability in the ordinary malpractice context.<sup>165</sup>

The great difficulty with many of the cases, even in states having malpractice statutes of limitations, is the failure to make an articulate distinction between ordinary, implied physician-patient contracts and special or express contracts, *i.e.* where the physician warrants a cure and thereby raises his duty above the ordinary standard.<sup>166</sup> In the

<sup>160</sup> *Roush v. Wolfe*, 243 Ky. 180, 47 S.W.2d 1021 (1932); *Guess v. Linton*, 236 Ky. 87, 32 S.W.2d 718 (1930). The Minnesota cases, without discussing the matter, simply apply the malpractice statute to all actions based upon medical malpractice.

<sup>161</sup> *Maercklein v. Smith*, 129 Colo. 72, 76, 266 P.2d 1095, 1097 (1954). *Accord*, *Barnhoff v. Aldridge*, 327 Mo. 767, 38 S.W.2d 1029 (1931); *Cox v. Cartwright*, 96 Ohio App. 245, 121 N.E.2d 673 (1953). *Contra*, *Stewart v. Rudner*, 349 Mich. 459, 84 N.W.2d 816 (1957). *Cf.* *Lakeman v. La France*, 102 N.H. 300, 156 A.2d 123 (1959) (special contract actions governed by contract statute).

<sup>162</sup> *Sellers v. Noah*, 209 Ala. 103, 95 So. 167 (1923); *Hickey v. Slattery*, 103 Conn. 719, 131 Atl. 558 (1926).

<sup>163</sup> *Yeager v. Dunnavan*, 26 Wash. 2d 559, 562, 174 P.2d 755, 757 (1946). *Accord*, *Wilson v. Blair*, 65 Mont. 155, 211 Pac. 289 (1922) (contract guaranteeing particular result allowed); *Seanor v. Browne*, 154 Okl. 222, 7 P.2d 627 (1932) (special contract possible); *Dowell v. Mossberg*, — Or. —, 359 P.2d 541 (1961) (express contract permitted); *Carpenter v. Moore*, 51 Wash. 2d 795, 322 P.2d 125 (1958) (contract to perform to patient's satisfaction upheld).

<sup>164</sup> *Norton v. Hamilton*, 92 Ga. App. 727, 731, 89 S.E.2d 809, 812 (1955).

<sup>165</sup> *Fadden v. Satterlee*, 43 Fed. 568 (S.D. Iowa 1890); *Patterson v. Vincent*, 44 Del. 442, 61 A.2d 416 (Super. Ct. 1948); *Kiersey v. McNeemer*, 197 Ill. App. 173 (1915); *Coulter v. Sharp*, 145 Kan. 28, 64 P.2d 564 (1937); *Weinstein v. Blanchard*, 109 N.J.L. 332, 162 Atl. 601 (1932); *Griffin v. Woodhead*, 30 R.I. 204, 74 Atl. 417 (1909); *Bodne v. Austin*, 156 Tenn. 353, 2 S.W.2d 100 (1928); *Kuhn v. Brownfield*, 34 W. Va. 252, 12 S.E. 519 (1890); *Klingbeil v. Saucerman*, 165 Wis. 60, 160 N.W. 1051 (1917).

<sup>166</sup> The opinions abound in ambiguous statements like the following: "Whether it be in tort or on contract it is an action to recover damages for injuries to the person and comes alike under the terms of the statute. . . ." *Klingbeil v. Saucerman*, 165 Wis. 60, 62,

sixteen states other than New York which have malpractice statutes, the belief that the legislature intended to adopt a comprehensive limiting statute probably will prevail, and all varieties of contract actions will be barred.<sup>167</sup> Particularly is this true in light of the language of some of these statutes, which are drafted to cover actions "whether based on contract or tort."<sup>168</sup> Until a uniform pattern of legislation develops, however, the law as to the availability of a contract remedy against negligent physicians will remain in the proverbial state of flux. At present the only settled issue appears to be the near-unanimous rejection of the contract remedy when the gist of the action is negligence.<sup>169</sup>

### *Fraud Action*

The decisions where a patient has attempted a fraud action are scant. Illinois<sup>170</sup> and Wisconsin<sup>171</sup> alone have accepted the argument that the physician's fraudulent concealment of his negligent act amounts to fraud. California,<sup>172</sup> Idaho,<sup>173</sup> and Ohio<sup>174</sup> have rejected it on the ground that such a complaint "sets up a cause of action in malpractice, and the allegations of fraudulent misrepresentation and of intentional concealment . . . do not transmute or change the cause of action from one in malpractice to one in deceit."<sup>175</sup> The question has been expressly left open in North Carolina<sup>176</sup> and North Dakota.<sup>177</sup>

Whatever be the status of attempts to frame an action for fraud, many legislatures and courts have realized that it is inequitable to allow a physician who has misrepresented or concealed his negligence to avoid liability by the expedient of pleading the malpractice statute of limitations. Several states, therefore, have enacted statutes applicable to malpractice actions which toll the statute where fraud is involved. These statutes are essentially of two types. The first kind explicitly states that the time during which the defendant fraudulently conceals the

160 N.W. 1051 (1917). See also *Bodne v. Austin*, 156 Tenn. 353, 356, 2 S.W.2d 100 (1928). Whether such statements preclude the bringing of actions on special contracts is uncertain.

<sup>167</sup> See cases cited at note 161 supra.

<sup>168</sup> Alabama, Arkansas, Indiana, Massachusetts, Minnesota and South Dakota. Colorado's statute covers actions whether in tort or "implied contract," thereby leaving open the possibility that the contract statute may apply to actions on express contracts, such a contract to cure. Four states have covered this problem by including actions for failure to cure within the coverage of their malpractice statutes. Alabama, Arkansas, Minnesota and South Dakota.

<sup>169</sup> Florida may be classified as an exception. See text accompanying note 159 supra.

<sup>170</sup> *Mills v. Warner*, 201 Ill. App. 258 (1916).

<sup>171</sup> *Krestich v. Stefanez*, 243 Wis. 1, 9 N.W.2d 130 (1943).

<sup>172</sup> *Tell v. Taylor*, 12 Cal. Rptr. 648 (Dist. Ct. App. 1961).

<sup>173</sup> *Trimming v. Howard*, 52 Idaho 412, 16 P.2d 661 (1932).

<sup>174</sup> *Swankowski v. Diethelm*, 98 Ohio App. 271, 129 N.E.2d 182 (1953).

<sup>175</sup> *Id.* at 275, 129 N.E.2d at 185.

<sup>176</sup> *Nowell v. Hamilton*, 249 N.C. 523, 107 S.E.2d 112 (1959).

<sup>177</sup> *Linke v. Sorenson*, 276 F.2d 151 (8th Cir. 1960).

cause of action is not included in the time limited to sue.<sup>178</sup> The second variety operates in a slightly more indirect fashion. It provides that, if the defendant obstructs the bringing of an action, the statute is tolled during the course of his obstruction.<sup>179</sup> A fraudulent concealment is clearly an obstruction within the meaning of these statutes.<sup>180</sup>

Even where such statutes are not in force, the vast majority of courts have held that a physician's concealment of his negligence tolls the running of the statute until the fraud is or should reasonably have been discovered.<sup>181</sup> Tolling for fraudulent concealment is considered by these courts as "an exception . . . [to the statute of limitations] *implied by the law* . . ."<sup>182</sup> Since the physician-patient relationship is a confidential one, affirmative acts of concealment need not always be proved;<sup>183</sup> the duty to disclose being present, a physician's silence is often deemed sufficient concealment.<sup>184</sup>

### CONCLUSION AND PROPOSED STATUTE

The prevention of stale claims, the reason for the statute of limitations, is of course a desirable objective. Where a statute works to bar claims which are not really stale, however, its desirability is open to question. Most malpractice statutes, construed by the courts as running from the date of the physician's negligence, achieve this dubious result.

<sup>178</sup> See, e.g., Ga. Code Ann. § 3-807 (1936); *Breedlove v. Aiken*, 85 Ga. App. 719, 70 S.E.2d 85 (1952); Mass. Ann. Laws, ch. 260, § 12 (1956); *Maloney v. Brackett*, 275 Mass. 479, 176 N.E. 604 (1931); Mich. Stat. Ann. § 27.612 (Supp. 1959); *Kroll v. Vanden Berg*, 336 Mich. 306, 57 N.W.2d 897 (1953).

<sup>179</sup> See, e.g., Ky. Rev. Stat. Ann. § 413.190 (1955); W. Va. Code Ann. § 5404 (Supp. 1959).

<sup>180</sup> *Adams v. Ison*, 249 S.W.2d 791 (Ky. 1952); *Baker v. Hendrix*, 126 W. Va. 37, 27 S.E.2d 275 (1943).

<sup>181</sup> See, e.g., *Burton v. Tribble*, 189 Ark. 58, 70 S.W.2d 503 (1934); *Morrison v. Acton*, 68 Ariz. 27, 198 P.2d 590 (1948); *Davis v. Bonebrake*, 135 Colo. 506, 313 P.2d 982 (1957); *Schmucking v. Mayo*, 183 Minn. 37, 235 N.W. 633 (1931); *Lakeman v. La France*, 102 N.H. 300, 156 A.2d 123 (1959); *Bauer v. Bowen*, 63 N.J. Super. 225, 164 A.2d 357 (1960); *Moses v. Miller*, 202 Okla. 65, 216 P.2d 979 (1950); *Dowell v. Mossberg*, — Or. —, 355 P.2d 624 (1960) (dictum), rev'd on other grounds, — Or. —, 359 P.2d 541 (1961); *Hinkle v. Hargens*, 76 S.D. 520, 81 N.W.2d 888 (1957); *Hall v. De Saussure*, 41 Tenn. App. 572, 297 S.W.2d 81, cert. denied, 201 Tenn. 164, 297 S.W.2d 90 (1956); *Barnard v. Thompson*, 138 Tex. 277, 158 S.W.2d 486 (1942); *Passey v. Budge*, 85 Utah 37, 38 P.2d 712 (1934); *Murray v. Allen*, 103 Vt. 373, 154 Atl. 678 (1931). Cf. *Bernath v. Le Fever*, 325 Pa. 43, 189 Atl. 342 (1937). Contra, *Trimming v. Howard*, 52 Idaho 412, 16 P.2d 661 (1932); *Ogg v. Robb*, 181 Iowa 145, 162 N.W. 217 (1917); *Graham v. Updegraph*, 144 Kan. 45, 58 P.2d 475 (1936); *McCoy v. Stevens*, 182 Wash. 55, 44 P.2d 797 (1935). See generally *Louisell & Williams*, supra note 40, at 375.

<sup>182</sup> *Guy v. Schuldt*, 236 Ind. 101, 106, 138 N.E.2d 891, 894 (1956).

<sup>183</sup> *Ibid.* See also *Kroll v. Vanden Berg*, 336 Mich. 306, 57 N.W.2d 897 (1953); *Schmucking v. Mayo*, 183 Minn. 37, 235 N.W. 633 (1931). Compare *Dawson*, supra note 104, at 904-06.

<sup>184</sup> *Louisell & Williams*, supra note 40, at 376: "The most extreme position that has been taken is that actual knowledge by the physician is not necessary where he was negligent in not discovering the injury. This position essentially is equivalent to holding that in malpractice cases the statute tolls until the injury is discovered."

As a leading commentator on medical jurisprudence noted twenty-five years ago:

This rule of law has, however, been the object of repeated criticism. It is pointed out that promptness of action presupposes knowledge of the existence of conditions which warrant such action, and that it is unreasonable to expect a person to bring suit for malpractice until he has actual knowledge of facts which constitute the wrong.<sup>185</sup>

Not only does the character of medical malpractice frequently preclude its discovery within a two year period, but the very relationship of physician-patient, with its attributes of trust and confidence, often prevents its prompt discovery.<sup>186</sup> Indeed, the present law of malpractice would often allow a dishonest physician to lull his patient into sleeping on his rights, while subjecting the honest physician who discloses his negligent treatment to liability.<sup>187</sup> The only possible safeguard against having an action barred in many instances would be to switch physicians, an occurrence the physician-patient relationship tends to discourage.<sup>188</sup>

Legal commentators in New York<sup>189</sup> and other states<sup>190</sup> have unanimously taken the position that a medical malpractice statute should not begin to run until the patient has discovered that he has been the victim of malpractice. The Law Revision Commission<sup>191</sup> and the Committee on Medical Jurisprudence of the Association of the Bar of the City of New York<sup>192</sup> have recommended enactment of such a statute. Even statistics gathered by the American Medical Association suggest that a liberalization of New York law would not be out of order. Although having 9.84 per cent of the country's population and 15.30 per cent of its physician population in 1950, New York had only 7.93 per cent of its malpractice cases.<sup>193</sup> Similarly, New York's rank by incidence of

<sup>185</sup> Oppenheimer, *A Treatise on Medical Jurisprudence* 113 (1935).

<sup>186</sup> Note, 21 *St. John's L. Rev.* 77, 79 (1946). See also Note, 12 *Sw. L.J.* 139, 141 (1958).

<sup>187</sup> Notes, 11 *W. Res. L. Rev.* 299, 301 (1960); 12 *Wyo. L.J.* 30, 37 (1957); 13 *Wash. & Lee L. Rev.* 264 (1956).

<sup>188</sup> Note, 9 *Mo. L. Rev.* 102, 105 (1944). "It is certainly both unreasonable and impractical to require a patient to go to another doctor immediately after an operation to ascertain if the operation has been performed correctly." Note, 12 *Wyo. L.J.* 30, 37 (1957).

<sup>189</sup> See note 30 *supra*.

<sup>190</sup> Comments, "The Forgotten Sponge and the Statute of Limitations," 1 *Washburn L.J.* 257, 272 (1961); "Statute of Limitations in an Action of Malpractice," 64 *Dick. L. Rev.* 173, 179 (1960); Notes, 5 *Vill. L. Rev.* 495, 498 (1960); 42 *Iowa L. Rev.* 97, 102 (1956); 35 *Mich. L. Rev.* 838, 840 (1937).

<sup>191</sup> See note 31 *supra*.

<sup>192</sup> See note 32 *supra*.

<sup>193</sup> Note, "Court Decisions—Medical Professional Liability," 164 *J.A.M.A.* 1349 (1957). These and other statistics also may be found in Stetler, "The History of Reported Medical Professional Liability Cases," 30 *Temp. L.Q.* 366, 370 (1957). An even greater statistical disparity would occur if many unreported trial and appellate court decisions from other states were capable of computation. New York, of course, reports most trial and appellate court opinions. See Note, *supra*, at 1349.

professional liability suits per physician fell from a low 37th for the period 1910-1925 to 42d from 1925-1940 and 43d from 1940-1955.<sup>194</sup> Undoubtedly, these statistics reflect the fact that New York's present statute has precluded many patients from instituting malpractice action.<sup>195</sup>

Since remedial legislation is obviously desirable, the problem becomes one of drafting a satisfactory statute. Several questions are present. First, to whom should the statute apply? Second, to what actions should it apply? Third, when should the statutory period start running? Fourth, what factors, if any, should toll the statute?

As to coverage, the continued use of the term "malpractice" would appear to be satisfactory unless a wider group is to be brought within the statute's purview. The term refers to the professional negligence of physicians, surgeons, dentists, and the like.<sup>196</sup> To avoid any possible misunderstanding as to the statute's scope,<sup>197</sup> the phrase "medical malpractice" might be used. Medical writers often use this phraseology,<sup>198</sup> although sometimes with a noticeable lack of enthusiasm.<sup>199</sup> Use of the term "malpractice," even with the "medical" modification, would exclude nurses and hospital employees from the statute's coverage.<sup>200</sup> Similarly, the liability of a hospital for the negligent acts of such personnel is in negligence and the three year statute of limitations applies.<sup>201</sup> Prior to 1957, when the Court of Appeals decided *Bing v. Thunig*,<sup>202</sup> physicians working in hospitals were deemed independent contractors; while the hospital could be held liable for its negligence in selecting a doctor, it was not responsible for the latter's malpractice.<sup>203</sup>

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<sup>194</sup> Sandor, *supra* note 90, at 465.

<sup>195</sup> See note 34 *supra*.

<sup>196</sup> See notes 3-10 *supra*.

<sup>197</sup> See notes 11-12 *supra*.

<sup>198</sup> Morris, "Res Ipsa Loquitur—Liability Without Fault," 163 J.A.M.A. 1055, 1056 (1957).

<sup>199</sup> "Malpractice" is an unfortunate word, because it so commonly implies that its victim [sic] is a bad doctor. This is not so. The best trained and most conscientious physician may err in a particular case. . . . Legally, no generalization is implied or warranted. Further, "malpractice" as a rule of law is not limited to physicians; it applies to all professional services furnished on a contract basis. [Sic] . . .

A more accurate term for physicians' legal responsibility would be "professional tort liability." However, "malpractice" is imbedded in both legal and medical literature and habit of thought, so its use no doubt will continue.

Hassard, "Professional Liability Claims Prevention," 163 J.A.M.A. 1267 (1957).

<sup>200</sup> See note 10 *supra*.

<sup>201</sup> *Wolff v. Jamaica Hosp.*, 11 App. Div. 2d 801, 205 N.Y.S.2d 152 (2d Dep't 1960); *Gautieri v. New Rochelle Hosp. Ass'n*, 4 App. Div. 2d 874, 166 N.Y.S.2d 934 (2d Dep't 1957), *aff'd*, 5 N.Y.2d 952, 157 N.E.2d 172, 183 N.Y.S.2d 803 (1959).

<sup>202</sup> 2 N.Y.2d 656, 143 N.E.2d 3, 163 N.Y.S.2d 3 (1957).

<sup>203</sup> *Roewekamp v. New York Post Graduate Medical School & Hosp.*, 254 App. Div. 265, 4 N.Y.S.2d 751 (2d Dep't 1938) (malpractice statute inapplicable in action against hospital for negligence in selecting physician).

The *Bing* holding, as construed by lower courts<sup>204</sup> and legal writers,<sup>205</sup> is that hospitals, under traditional principles of *respondeat superior*, are responsible for acts of their staff physicians and internes as well as nurses and employees. Whether hospitals may utilize the malpractice statute in physician and interne cases is an open question.<sup>206</sup>

Reference to the medical personnel covered by the provisions of the sixteen other states having special malpractice statutes is helpful in determining whether to expand the statute's coverage. Four of these states, like New York at present, do not attempt to specify those covered.<sup>207</sup> Of the dozen states spelling out those coming under their statutes, twelve mention physicians,<sup>208</sup> eleven include surgeons,<sup>209</sup> ten specify dentists,<sup>210</sup> and seven list hospitals and sanitarium.<sup>211</sup> Thereafter, the pattern breaks down. Chiropractors and chiropodists are included in Colorado and Connecticut, midwives in Colorado, nurses in Missouri, optometrists in Massachusetts, osteopaths in Colorado, and roentgenologists in Missouri.<sup>212</sup> Two states have "open end" provisions: Indiana, after listing those falling under its statute, includes "or others," and Maine adds "all others engaged in the healing art."

In the opinion of this writer, the statute's coverage should be left unchanged, allowing the courts freedom to apply the statute to those medical personnel deemed to fall within its scope. However, strong arguments can be mustered that the increased utilization of hospitals since New York's present statute was enacted in 1900 and the unitary nature of modern medical treatment require that hospitals and sanitarium be specifically covered by the statute. Since more field research seems necessary before such a step is taken, this writer prefers to retain the status quo in this respect, leaving the possibility of including hospitals and sanitarium to a later day.

<sup>204</sup> *Morwin v. Albany Hosp.*, 7 App. Div. 2d 582, 185 N.Y.S.2d 85 (3rd Dep't 1959); *Hollant v. North Shore Hosp.*, 24 Misc. 2d 892, 206 N.Y.S.2d 177 (Sup. Ct. Nassau County 1960).

<sup>205</sup> Willcox, "Hospitals and the Corporate Practice of Medicine," 45 Cornell L.Q. 432, 484 n.160 (1960); Thornton & McNiece, "Torts and Workmen's Compensation," 1957 Survey of N.Y. Law, 32 N.Y.U.L. Rev. 1465, 1480 (1957); Note, 57 Colum. L. Rev. 1041, 1043 (1957).

<sup>206</sup> But see *Ferraro v. New York Univ.*, 13 Misc. 2d 131, 177 N.Y.S.2d 788 (Sup. Ct. New York County 1958) (physician alone pleaded malpractice statute in action against physician and hospital).

<sup>207</sup> Nebraska, New Hampshire, North Dakota and Ohio.

<sup>208</sup> Alabama, Arkansas, Colorado ("any person licensed to practice medicine"), Connecticut, Indiana, Kentucky, Massachusetts, Maine, Michigan, Minnesota, Missouri and South Dakota.

<sup>209</sup> See, with the exception of Maine, those states listed in note 208 supra.

<sup>210</sup> See, with the exception of Maine and Kentucky, those states listed in note 208 supra.

<sup>211</sup> Arkansas, Connecticut, Indiana, Massachusetts, Minnesota, Missouri and South Dakota.

<sup>212</sup> Among those classes of medical personnel unmentioned in the twelve statutes are anesthesiologists, dermatologists, osteopaths and podiatrists.

The second problem involved in drafting remedial legislation concerns the types of actions to which the statute should apply. Unless the availability of the contract remedy and the continuous treatment theory are negated by the statute, the possibility exists that New York courts might consider such fictions still available. Enough has been shown above to demonstrate their unsatisfactory character.<sup>213</sup> Adopted by the courts as a means of circumventing the present malpractice statute, they often work inequities on both physicians and patients, and their need is obviated by the type of statute recommended below. To insure the abolition of the contract action, a provision should be included, similar to that found in the malpractice statutes of seven states, making the statute applicable to all malpractice actions whether based on contract or tort.<sup>214</sup> The continuous treatment theory is jettisoned by the accrual rule recommended below.

The third and major problem concerns when the statute begins to run. Upon this decision turns the related question of the length of the statutory period. The 1942 Law Revision Commission proposal retained the traditional approach of running the statute from the accrual of the cause of action but, taking into account the criticism of the courts' construction of this language, added the important proviso that "*the cause of action in such a case is not deemed to have accrued until the discovery by the injured person of the facts constituting the malpractice, but this provision shall not permit commencement of such an action after six years from the occurrence of such malpractice.*"<sup>215</sup> The two year period found in section 50 was reduced to one year for reasons left unexplained. This suggested statute has been called "the model answer to this problem."<sup>216</sup>

The 1958 proposal of the Association of the Bar of the City of New York follows the Commission's basic pattern, but it retains the two year statutory period of section 50 and provides an absolute immunity "four years after the commission of the malpractice."<sup>217</sup>

The proposed revision of the Civil Practice Act represents an unsatisfactory compromise with the above two proposals. Section 214(6)

<sup>213</sup> See text at notes 50 and 85-93 *supra*.

<sup>214</sup> Alabama, Arkansas, Colorado ("implied contract"), Indiana, Massachusetts, Minnesota and South Dakota.

<sup>215</sup> Recommendations of the Law Revision Comm'n to the Legislature, Leg. Doc. No. 65(E) at 14, Report N.Y. Law Rev. Comm'n at 142 (1942).

<sup>216</sup> Note, 21 St. John's L. Rev. 77, 80 (1946).

<sup>217</sup> "A cause of action for malpractice is not deemed to have accrued until the discovery by the plaintiff or the person under whom he claims of the facts constituting the malpractice, but in no event may such action be commenced more than four years after the commission of the malpractice." Committee on Medical Jurisprudence, *supra* note 11, at 467-68.

of the 1961 proposed bill, a three year statute, governs a malpractice action.<sup>218</sup> The reason for extending the permissible period, the Advisory Committee on Practice and Procedure explained, was that "in many actions for malpractice the effect of the tort and the fact that it has occurred is not known promptly to the person injured."<sup>219</sup> Allowing three years in which to bring all malpractice actions seems unwarranted, and placing an absolute bar on all actions after this period would certainly not handle many where malpractice is not readily discoverable. In the six New York cases from which meaningful statistics could be gleaned, the mean time span from the date of the malpractice to its discovery was three years and two months, and in the seventeen cases where relevant facts were available the average lapse of time from the commission of malpractice to the commencement of suit was three years and four months.

Two states having malpractice statutes start them running when the malpractice is discovered. Alabama's two year statute runs from the negligent act, but,

if the cause of action is not discovered and could not reasonably have been discovered within such period, the action may be commenced within six months from the date of discovery or the date of discovery of facts which would reasonably lead to such discovery, whichever is earlier, provided further that in no event may the action be commenced more than six years after such act.

The statute is noteworthy for its qualification of the discovery rule, in that possession of facts which would reasonably lead to discovery suffices to start the statute. Also, if the discovery provision is relied upon the plaintiff must begin his action with the shorter, six month period. The absolute six year bar accords with the Commission's 1942 proposal.

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<sup>218</sup> Senate Bill No. 26, Int. 26, Jan., 1961. Section 5.14 of the 1960 study bill, a three year personal injury statute, formerly was to cover the "tort" of malpractice. See Senate Bill No. 26, Int. 26, Jan., 1960 and Report of the Temporary Commission on the Courts, Leg. Doc. No. 13 at 71 (1958). According to the drafters of the 1961 bill, specific reference "to an action to recover damages for malpractice was added on the suggestion that malpractice involving property damage—e.g., against an accountant—may be based on a contract theory and would otherwise be governed by the six year provision unless specific reference was made." Final Report of the Advisory Comm. on Practice and Procedure, Leg. Doc. No. 15 at — (1961). This statement indicates considerable confusion about what persons and what actions fall within a "malpractice" provision. In the first place, the problem of accountants is in no way solved by the 1961 bill, since they have never been deemed to fall under a malpractice statute. See note 12 *supra*. Secondly, merely specifying a time period for malpractice actions would not achieve the drafters' purpose of abolishing contract actions, which are permitted now despite the existence of a reference to malpractice in § 50(1). In this writer's opinion, § 214(6) would permit both the maintenance of contract actions and the use of the continuous treatment theory. These defects alone deprive the proposed section of most of its remedial value.

<sup>219</sup> Report of the Temporary Comm'n on the Courts, Leg. Doc. 13 at 538 (1958).



Connecticut's statute requires the action to be brought within one year from the date when the injury is first sustained or discovered or in the exercise of reasonable care should have been discovered, and except that no such action may be brought more than three years from the date of the act or omission complained of. . . .

This statute shortens the permissible period in which to bring an action to one year, like the Commission's 1942 proposal, and follows the latter, unlike Alabama's approach, in applying its time period across-the-board. However, the statute varies from the Commission's model in that the discovery rule is qualified and a short absolute period of three years is adopted.

In considering remedial legislation for New York, several policy choices must be made at this point. It is this writer's opinion that the most satisfactory statute would include a two year, across-the-board period, a discovery accrual provision,<sup>220</sup> and an absolute limitation period of six years. Applying such a statute to the seventeen New York cases containing sufficient factual data to make application meaningful, it appears that such a statute would have barred only one action.<sup>221</sup>

The fourth and final problem presented in drafting a new malpractice statute is the factors, if any, which should toll the statute. If the discovery doctrine is utilized, the need for tolling the statute by means of the continuous treatment theory or other fiction disappears. Many states have held that fraudulent concealment postpones the running of the statute, but no state has explicitly provided so in its malpractice statute. Certainly, such a provision would be unnecessary if a discovery-type statute is proposed, for it would be a rare case where a physician could conceal his malpractice for over a six year absolute period.

There is one situation, however, where a tolling of the statute might be warranted. The malpractice statute of limitations is shorter than the limitation period applied to a physician's action for his services, and physicians have been repeatedly advised to postpone instituting actions until the malpractice statute has run.<sup>222</sup> When the physician does sue, the patient with a malpractice claim finds that the statute prevents him

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<sup>220</sup> Although a rule postponing the period until the plaintiff reasonably should learn of the harm might require a determination of "reasonableness" in each case, and the advantage of "keeping easy cases out of court" might be lost, yet the burden on the courts probably would not be unduly increased, for the number of "inherently unknowable" injuries would necessarily be small and exceptions to the rule that ignorance is immaterial have already been recognized.

Comment, "Developments in the Law—Statutes of Limitations," 63 Harv. L. Rev. 1177, 1204-05 (1950).

<sup>221</sup> *Ranalli v. Breed*, 251 App. Div. 750, 297 N.Y. Supp. 688 (2d Dep't 1937), *aff'd*, 277 N.Y. 630, 14 N.E.2d 195 (1938).

<sup>222</sup> Sandor, *supra* note 90, at 464. See also Note, "Professional Liability and Statutes of Limitation," 164 J.A.M.A. 187, 189 (1957).

from pleading his claim as a defense or counterclaim.<sup>223</sup> Minnesota and South Dakota have recently enacted statutes permitting a barred malpractice claim to be interposed as a defense to a physician's action for services, if it was the property of the party pleading it at the time it became barred and was not barred at the time the claim sued on originated. When such a defense is pleaded, no judgment except for costs can be rendered in favor of the party pleading it.<sup>224</sup> Such a provision is worth inclusion in any new statute.

Incorporating the above conclusions in a proposed new statute for New York, this writer strongly urges that section 50 of the Civil Practice Act be amended as follows:

§ 50. Actions to be commenced within two years. The following actions must be commenced within two years after the cause of action has accrued:

1. An action to recover damages for assault, battery, false imprisonment [,] or malicious prosecution [or malpractice].

2. An action upon a statute for a forfeiture or penalty to the people of the state.

3. *An action to recover damages for medical malpractice. A cause of action for medical malpractice, whether based on tort, contract or any other theory, against a physician, surgeon, dentist, or others rendering similar professional services, is deemed to have accrued upon the discovery by the plaintiff or the person under whom he claims of the facts constituting the malpractice, but this provision shall not permit commencement of such an action after six years from the occurrence of such medical malpractice. The facts constituting the malpractice may be pleaded as a defense to an action for services brought by a physician, surgeon, dentist, or others rendering similar professional services, after the limitations herein prescribed, notwithstanding that an action for such malpractice is barred by this section.*

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<sup>223</sup> Garben v. McKittrick, 225 App. Div. 772, 232 N.Y. Supp. 390 (2d Dep't 1928); Fish v. Conley, 221 App. Div. 609, 225 N.Y. Supp. 27 (3d Dep't 1927).

<sup>224</sup> Compare Connecticut's ambiguous statute.

## APPENDIX I

## MALPRACTICE STATUTES OF OTHER STATES

*Ala. Code tit. 7, § 25(1) (1960)\**

All actions against physicians and surgeons, and dentists for malpractice, error, mistake, or failure to cure, whether based on contract or tort, must be commenced within two years next after the act or omission or failure giving rise to the cause of action, and not afterwards. Provided that if the cause of action is not discovered and could not reasonably have been discovered within such period, then the action may be commenced within six months from the date of such discovery or the date of discovery of facts which would reasonably lead to such discovery, whichever is earlier, provided further that in no event may the action be commenced more than six years after such act.

*Ark. Stat. Ann. § 37-205 (1947)*

Hereafter all actions of contract or tort for malpractice, error, mistake, or failure to treat or cure, against physicians, surgeons, dentists, hospitals, and sanitararia, shall be commenced within two [2] years after the cause of action accrues. The date of the accrual of the cause of action shall be date of the wrongful act complained of, and no other time.

*Colo. Rev. Stat. Ann. § 87-1-6 (1953)*

No person shall be permitted to maintain an action, whether such action sound in tort or implied contract, to recover damages from any person licensed to practice medicine, chiropractic, osteopathy, chiropody, midwifery or dentistry on account of the alleged negligence of such person in the practice of the profession for which he is licensed or on account of his failure to possess or exercise that degree of skill which he actually or impliedly represented, promised or agreed that he did possess and would exercise, unless such action be instituted within two years after such cause of action accrued.

*Conn. Gen. Stat. § 52-584 (1958)*

No action to recover damages for injury to the person . . . caused by . . . malpractice of a physician, surgeon, dentist, chiropodist, chiropractor, hospital or sanatorium, shall be brought but within one year from the date when the injury is first sustained or discovered or in the exercise of reasonable care should have been discovered, and except that no such action may be brought more than three years from the date of the act or omission complained of, except that a counterclaim may be interspersed in any such action any time before the pleadings in such action are finally closed.

*Ind. Ann. Stat. § 2-627 (1946)*

No action of any kind for damages, whether brought in contract or tort, based upon professional services rendered or which should have been rendered, shall be brought, commenced or maintained, in any of the courts of this state against physicians, dentists, surgeons, hospitals, sanitariums, or others, unless said action is filed within two [2] years from the date of the act, omission or neglect complained of.

*Ky. Rev. Stat. Ann. § 413.140 (1959)*

(1) The following actions shall be commenced within one year after the cause of action accrued:

\* \* \*

(e) An action against a physician or surgeon for negligence or malpractice.

*Me. Rev. Stat. Ann. ch. 112, § 93 (1954)*

Actions for . . . malpractice of physicians and all others engaged in the healing art shall be commenced within 2 years after the cause of action accrues.

*Mass. Ann. Laws ch. 260, § 4 (Supp. 1960)*

[A]ctions of contract or tort for malpractice, error or mistake against physicians, surgeons, dentists, optometrists, hospitals and sanitararia . . . shall be commenced only within two years next after the cause of action accrues. . . .

*Mich. Stat. Ann. § 27.605 (Supp. 1959)*

3. Actions . . . for malpractice of physicians, surgeons or dentists . . . shall be brought within 2 years from the time the cause of action accrues, and not afterwards. . . .

*Minn. Stat. Ann. § 541.07 (Supp. 1960)*

The following actions shall be commenced within two years:

(1) [A]ll actions against physicians, surgeons, dentists, hospitals, sanitariums, for malpractice, error, mistake or failure to cure, whether based on contract or tort; provided a counterclaim may be pleaded as a defense to any action for services brought by a physician, surgeon, dentist, hospital or sanitarium, after the limitations herein described notwithstanding it is barred by the provisions of this chapter, if it was the property of the party pleading it at the time it became barred and was not barred at the time the claim sued on originated, but no judgment thereof except for costs can be rendered in favor of the party so pleading it. . . .

*Mo. Ann. Stat. § 516.140 (1952)*

All actions against physicians, surgeons, dentists, roentgenologists, nurses, hospitals and sanitariums for damages for malpractice, error, or mistake shall be brought within two years from the date of the act of neglect complained of. . . .

*Neb. Rev. Stat. § 25-208 (1956)*

The following actions can only be brought within the periods herein stated: . . . within two years, an action for malpractice.

*N.H. Rev. Stat. Ann. § 508:4 (1955)*

[A]ctions for malpractice . . . may be brought within two years . . . after the cause of action accrued, and not afterward.

*N.D. Century Code Ann. § 28-01-18 (1960)*

The following actions must be commenced within two years after the cause of action has accrued:

3. An action for the recovery of damages resulting from malpractice. . . .

*Ohio Rev. Code Ann. § 2305.11 (Page 1958)*

An action for . . . malpractice . . . shall be brought within one year after the cause thereof accrued. . . .

*S.D. Code § 33.0232 (Supp. 1960)*

Except where, in special cases, a different limitation is prescribed by statute, civil actions other than for the recovery of real property can be commenced only within the following specified periods of time after the cause of action shall have accrued:

\* \* \*

(6) Within two years:

\* \* \*

(c) An action against a physician, surgeon, dentist, hospital, or sanitarium for malpractice, error, mistake, or failure to cure, whether based on contract or tort; provided, a counterclaim may be pleaded as a defense to any action for services brought by a physician, surgeon, dentist, hospital, or sanitarium, after the limitations herein prescribed, notwithstanding it is barred by the provisions of this chapter, if it was the property of the party pleading it at the time it became barred and was not barred at the time the claim sued on originated, but no judgment thereon except for costs can be rendered in favor of the party so pleading it. . . .

## APPENDIX II

## RELEVANT STATUTES OF OTHER STATES

Alaska Comp. Laws Ann. § 55-2-7 (1949); Ariz. Rev. Stat. Ann. § 12-542 (1956); Cal. Civ. Proc. Code § 340 (1954); Del. Code Ann. tit. 10, § 8118 (Supp. 1960); D.C. Code Ann. § 12-201 (1952); Fla. Stat. Ann. § 95.11 (1960); Ga. Code Ann. § 3-1004 (1936); Hawaii Rev. Laws § 241-7 (Supp. 1960); Idaho Code Ann. § 5-219 (1948); Ill. Stat. Ann. § 83.15 (Jones Supp. 1956); Iowa Code Ann. § 614.1 (1950); Kan. Gen. Stat. Ann. § 60-306 (1950); La. Stat. Ann., Civ. Code Art. 3536 (1953); Md. Ann. Code, art. 57, § 1 (1957); Miss. Code Ann. § 722 (1957); Mont. Rev. Codes Ann. § 93-2605 (1949); Nev. Rev. Stat. § 11.190 (1960); N.J. Stat. Ann. § 14-2 (1952); N.M. Stat. Ann. § 23-1-8 (1953); N.C. Gen. Stat. § 1-52 (1953); Okl. Stat. Ann. tit. 12, § 95 (1960); Ore. Rev. Stat. § 12-110 (1959); Pa. Stat. Ann. tit. 12, § 34 (1953); R.I. Gen. Laws Ann. § 9-1-14 (1956); S.C. Code § 10-143 (1952); Tenn. Code Ann. § 28-304 (1955); Tex. Rev. Civ. Stat. art. 5526 (1958); Utah Code Ann. § 78-12-25 (1953); Vt. Stat. Ann. tit. 12 § 512 (1958); Va. Code Ann. §§ 8-33, 8-24 (1957); Wash. Rev. Code § 4.16.080 (1956); W. Va. Code Ann. § 5404 (Supp. 1959); Wis. Stat. Ann. § 330.205 (Supp. 1961); Wyo. Stat. Ann. § 1-18 (1959).